TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 659

CENTRAL HANOVER BANK AND TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW YORK, GEORGE CHEW ATKINS AND JOHN NORTON ATKINS, AS EXECUTORS, ETC., ET AL., APPELLANTS,

vs.

WILLIAM D. KELLY, STATE TAX COMMISSIONER OF NEW JERSEY

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED JANUARY 18, 1943.

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[fol. 1] **SUPREME COURT OF NEW JERSEY**

WRIT OF CERTIORARI—April 30, 1941

NEW JERSEY, ss.:

(L. S.)

The State of New Jersey to The Honorable Luther A. Campbell, Ordinary of the State of New Jersey, and Thomas A. Mathis, Register of the Prerogative Court of the State of New Jersey—Greeting:

We being willing for certain reasons to be certified of a certain decree or order made by you, Luther A. Campbell, Ordinary of the State of New Jersey, under date of March 27th, 1941, in a cause wherein Central Hanover Bank and Trust Company, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually were appellants, and J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey was the respondent, which decree or order affirmed an assessment of transfer inheritance taxes by the State Tax Commissioner of the State of New Jersey:

We Do Hereby Command You, Thomas A. Mathis, Register of the Prerogative Court of the State of New Jersey, that you certify and send under seal to our Justices of our Supreme Court of Judicature, at Trenton, on the 20th day of May, 1941, the said decree of the Ordinary of the Prerogative Court, together with the record of said Prerogative Court in said matter, including the notice of appeal, petition of appeal, answer, affidavits and exhibits, stipulations and conclusions filed therein, together with any and all other things touching and concerning said appeal as fully and completely as they remain before you, together with this writ; that therein may be done what of right and ac-

[fol. 2] cording to the laws of this state ought to be done.

Witness, Honorable Thomas J. Brogan, Chief Justice of our Supreme Court, at Trenton, this 30th day of April, 1941.

Fred L. Bloodgood, Clerk.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutors-Petitioners.

SUPREME COURT OF NEW JERSEY

ALLOCATUR—April 26, 1941

I allow this writ. Let it be sealed.
Charles W. Parker, Supreme Court Justice.

IN SUPREME COURT OF NEW JERSEY

RETURN TO WRIT

In obedience to the command of this writ to me directed, I, Luther A. Campbell, Ordinary or Surrogate General of the State of New Jersey and Judge of the Prerogative Court of the State of New Jersey, Do Hereby Certify and send to the Honorable Justices of the Supreme Court, within mentioned, the order or decree made by me on the twenty-seventh day of March, 1941 by virtue of the powers conferred upon me by Title 54, Chapter 34 of the Revised Statutes and supplements and amendments thereto, affirming the assessment and transfer inheritance tax made on February 11, 1938 by the State Tax Commissioner in the matter of the Estate of George W. E. Atkins, deceased, late of [fol. 3] Essex County, New Jersey, insofar as said assessment includes a tax on the transfers of the installments coming due at and after the death of the decedent and payable to George Chew Atkins and John Norton Atkins, sons of the decedent, under the six refund annuity agreements or policies of the Equitable Life Assurance Society of New York and the New York Life Insurance Company, and insofar as said assessment includes a tax on the transfers to said two sons of the grantor of the equitable interests in remainder under the deed of trust executed by the decedent on May 16, 1929, in the matter of the Estate of George W. E. Atkins, deceased wherein the Central Hanover Bank and Trust Company, George Chew Atkins and John Norton Atkins as executors under the last will and testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins individually were appellants and J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey is respondent, together with the record of the said assessment of transfer inheritance tax above mentioned, together also with the petition of appeal pre-

sented to me and the answer of State Tax Commissioner to said petition of appeal and all other proceedings and matters touching and concerning said decree, assessment and appeal and said petition of appeal and the proceedings thereunder as fully as the same remain before me or under my control, as by the transcript of the same under my hand and the seal of the Prerogative Court certified and annexed more fully appears.

Luther A. Campbell, Ordinary. (Seal.)

[fol. 4] PREROGATIVE COURT OF NEW JERSEY

In the Matter of the Appeal from the Assessment Levied Against the ESTATE OF GEORGE W. E. ATKINS, DECEASED

STIPULATION—Filed July 7, 1938

It is hereby stipulated and agreed by and between Child, Riker, Marsh & Shipman, Proctors for Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, and David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner, that attached hereto are true copies of the papers and other documents or abstracts thereof constituting the record in the matter of the assessment of the tax levied by the State Tax Commissioner of the State of New Jersey against the Estate of George W. E. Atkins, deceased, and that the same shall constitute the transcript of the said record to be used by the [fol. 5] Prerogative Court in the determination of the appeal filed in said matter.

Dated:

Child, Riker, Marsh & Shipman, Proctors for Executors and George Chew Atkins and John Norton Atkins, Individually; David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner.

PREROGATIVE COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL—Filed April 12, 1938

To the State Tax Commissioner of the State of New Jersey.
To the Clerk of the Prerogative Court of the State of New Jersey:

SIRS:

Take notice that Central Hanover Bank and Trust Company, a banking corporation organized under the laws of [fol. 6] the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins individually, hereby appeal to the Prerogative Court of the State of New Jersey from the assessment made by the State Tax Commissioner of the State of New Jersey in the matter of the Estate of George W. E. Atkins, deceased, wherein and whereby he fixed and determined the net cash value of the said estate at the sum of $601,466.18, and also from the assessment made by the said Commissioner against George Chew Atkins in the amount of $298,991.86 for the transfer to him in the above estate and fixing a tax of $9,899.59 thereon, and also from the assessment made by the said Commissioner against John Norton Atkins in the amount of $302,474.32 for the transfer to him in the above estate and fixing a tax of $10,988.05 thereon.

Dated: April 11th, 1938.

Child, Riker, Marsh & Shipman, Proctors for Executors and George Chew Atkins and John Norton Atkins, Individually.

Service of the within Notice of Appeal in hereby acknowledged this 12th day of April, 1938.

David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner.

[fol. 7] PREROGATIVE COURT OF NEW JERSEY

[Title omitted]

PETITION OF APPEAL—Filed April 12, 1938

To the Ordinary of the State of New Jersey:

The petition of Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, appellants in the above stated matter, respectfully shows:

1. That your petitioners find themselves aggrieved by an assessment levied against the Estate of George W. E. Atkins, deceased, by the State Tax Commissioner of the State of New Jersey, wherein and whereby he fixed and determined the net value of said estate to be the sum of $601,466.18 upon the ground that the same is erroneous, illegal and void for that in determining and levying the said assessment the said Tax Commissioner of the State of New Jersey included as a part of the taxable assets thereof the sum of $28,683.30, being the amount payable to George Chew Atkins and John Norton Atkins under and in accordance with certain annuity policies of the Equitable Life As-
[fol. 8] surance Company of the United States and the New York Life Insurance Company, as follows:

Company	Beneficiary	Amount
Equitable Life—#9,142,731	George Chew Atkins and John Norton Atkins	$4,787 73
Equitable Life—#9,260,836	George Chew Atkins and John Norton Atkins	3,322 77
Equitable Life—#9,545,296	George Chew Atkins and John Norton Atkins	4,786 42
Equitable Life—#8,877,293	John Norton Atkins	3,808 87
Equitable Life—#8,948,433	George Chew Atkins	4,138 67
New York Life—#303,553	George Chew Atkins and John Norton Atkins	7,838 84

whereas, the moneys so received are not taxable property of the said estate and the transfer thereof is not a taxable transfer within the provisions of the statute in such case made and provided, for the following reasons:

a. The moneys are the proceeds of a contract of insurance and the payment of the same to the beneficiaries is not a

transfer of property by deed, grant, bargain, sale or gift made in contemplation of the death of George W. E. Atkins.

b. The moneys are the proceeds of a contract of insurance and the payment of the same to the beneficiaries is not a transfer of property by deed, grant, bargain, sale or gift to take effect in possession or enjoyment at death of George W. E. Atkins.

c. The moneys are the proceeds of a contract of insurance and as such are exempt from taxation under the provisions of the statute in such case made and provided.

[fol. 9] 2. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey, wherein and whereby he fixed and determined the net value of the said estate to be the sum of $601,466.18 upon the ground that the same is erroneous, illegal and void for that in determining and levying the said assessment the said State Tax Commissioner of the State of New Jersey included as part of the taxable property of said estate the sum of $376,917.04, being the appraised value of the securities comprising a certain trust fund created by and in accordance with an agreement of trust made on the 16th day of May, 1929, by and between George W. E. Atkins and the Central Hanover Bank and Trust Company of the City of New York, whereas the bonds, stocks, mortgages and cash belonging to such trust fund are not taxable property in accordance with the statue in such case made and provided, for the following reasons:

a. The State of New Jersey had no jurisdiction to tax the property as it did not have a taxable situs within the States of New Jersey at the time of the transfer thereof.

b. The transfer alleged to be subject to the tax occurred without the territorial boundaries of the State of New Jersey and is, therefore, not taxable by the State of New Jersey.

[fol. 10] c. The property comprising the said trust fund was located without the territorial boundaries of the State of New Jersey at the time of the execution of the said agree-

ment of trust on May 16th, 1929; the said agreement was executed by the parties thereto outside of the State of New Jersey, the legal title of said property transferred thereby to the Central Hanover Bank and Trust Company, a resident of the State of New York and domiciled therein, and that the legal title and possession of all of the said property has always remained in said Central Hanover Bank and Trust Company and the trust fund entirely administered by the Central Hanover Bank and Trust Company without the State of New Jersey since the execution of the said agreement and during the entire lifetime of the said George W. E. Atkins, and the transfer thereof is not a taxable transfer within the provisions of the statute of New Jersey in such case made and provided.

d. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

e. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while with- [fol. 11] out the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the denial to any person within its jurisdiction of the equal protection of the laws, as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

f. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fifth Amendment of the Constitution

of the United States prohibiting the taking of private property for public use without just compensation as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

g. If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Sixteenth Section of the First Article of the Constitution of the State of New Jersey prohibiting the taking of private property for public use without just compensation as the State of New Jersey had no power or jurisdiction to tax property located outside of its own boun- [fol. 12] daries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

3. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against George Chew Atkins in the amount of $298,991.86 for his transfer in the above estate and the fixing of the tax thereon at the sum of $9,899.59 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to the said George Chew Atkins the sum of $10,367.88, representing the commuted value of the annuity contracts of the Equitable Life Assurance Company on policies Nos. 9,142,731, 9,260,836 and 9,545,296, and of the New York Life Insurance Company No. 303,553, and the sum of $4,138.67, representing the commuted value of the annuity contract of the Equitable Life Assurance Company No. 8,948,433, for the reasons more particularly set forth in paragraph one hereof.

4. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and

testament of George W. E. Atkins, deceased, and George [fol. 13] Chew Atkins, individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against George Chew Atkins in the amount of $298,991.86 for his transfer in the above estate and the fixing of the tax thereon at the sum of $9,899.59 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to said George Chew Atkins the sum of $188,458.52, representing the value of one-half of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, for the reasons more particularly set forth in paragraph two hereof.

5. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and John Norton Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against John Norton Atkins in the amount of $302,474.32, for his transfer in the above estate and the fixing of a tax thereon in the sum of $10,098.46 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to said John Norton Atkins the sum of $10,367.88, representing the commuted value of the annuity contracts of the Equitable Life Assurance [fol. 14] Company on policies Nos. 9,142,731, 9,260,836 and 9,545,296, and of the New York Life Insurance Company No. 303,553, and the sum of $3,808.87, representing the commuted value of the annuity contract of the Equitable Life Assurance Company No. 8,877,293, for the reasons more particularly set forth in paragraph one hereof.

6. That your petitioners, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and John Norton Atkins individually, find themselves aggrieved by the assessment made by the State Tax Commissioner of the State of New Jersey against John Norton Atkins in the

amount of $302,474.32 for his transfer in the above estate and the fixing of a tax thereon in the sum of $10,098.46 upon the ground that the same is erroneous, illegal and void for that in determining and levying said assessment and tax the said Commissioner erroneously included as a part of the value of the estate passing to said John Norton Atkins the sum of $188,458.42, representing the value of one-half of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, for the reasons more particularly set forth in paragraph two hereof.

Your petitioners, therefore, pray that the action of the State Tax Commissioner of the State of New Jersey in fixing the assessment aforesaid and imposing a transfer inheritance tax upon their and each of their transfers in the [fol. 15] Estate of George W. E. Atkins, deceased, respectively, may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem just.

Child, Riker, Marsh & Shipman, Proctors for Appellants.

Service of the within Petition of Appeal is hereby acknowledged this 12th day of April, 1938.

David T. Wilentz, Attorney General of New Jersey, as Proctor for the State Tax Commissioner.

[fol. 16] Prerogative Court of New Jersey

[Title omitted]

Answer to Petition of Appeal—Filed May 16, 1938

Respondent, answering the petition of appeal says:

1. Paragraphs 1, 2, 3, 4, 5, and 6 are denied.

David T. Wilentz, Attorney General of New Jersey, Proctor for Respondent. William A. Moore, Of Special Counsel.

Consent to the filing of the within Answer as within time is hereby given this Second day of May, 1938.

Child, Riker, Marsh & Shipman; Proctors for Executors and George Chew Atkins and John Norton Atkins, Individually.

[fol. 17] PREROGATIVE COURT OF NEW JERSEY

INHERITANCE TAX RETURN

The Inheritance Tax Return is not re-copied in full but the following constitute the salient features thereof insofar as the same affect this appeal:

Affidavit was made by C. L. Herterich, as Assistant Vice-President of the Central Hanover Bank and Trust Company, John Norton Atkins and George Chew Atkins Executors, on the 11th of June, 1937. The affidavit recites that George W. E. Atkins died November 9th, 1936, leaving a will; that he had no safe deposit box, except one located at the Safe Deposit Company of New York, 149 Broadway, New York City, registered in the name of George W. E. Atkins.

Schedule-A: No real property.

Schedule-B: Personal property—Lists various bonds and stocks of companies, notes and bank accounts owned by George W. E. Atkins at the time of his death, totalling $215,977.62. It further lists as not taxable the following items:

Insurance Annuity Contracts

Equitable Life Assurance of the U. S. at commuted values of the remaining instalments on Nov. 9, 1936.		
Beneficiaries of Refund, George Chew Atkins and J. Norton Atkins.		
#9,142,731	$4,787.73	
9,260,836	3,322.77	
9,545,296	4,786.42	
		$12,896.92
Beneficiary of Refund, J. Norton Atkins #8,877,293		3,808.87
Beneficiary of Refund, George Chew Atkins #8,948,433		4,138.67
New York Life Insurance Co. at commuted values of the remaining instalments on Nov. 9, 1936.		
Beneficiary of Refunds, George C. Atkins and John N. Atkins $303,553		7,838.84
		$28,683.30

[fol. 18] Schedule-C: Transfers—The following is a schedule of the questions and answers appearing at the top of Schedule-C:

1. Did decedent, *within two years of death*, make any transfer of a material part of estate without receiving an adequate valuable consideration therefore? No.

2. Did decedent, *within two years of death*, transfer any property of a value of $1,000.00, or more, without having received an adequate, valuable consideration therefor? No.

3. Did decedent, *at any time*, make any transfer of property in contemplation of death without having received an adequate, valuable consideration therefor? No.

4. Did decedent, *at any time*, make a transfer of a material part of his estate, without having received an adequate, valuable consideration therefor? See copy of trust deed attached hereto.

Is it contended that such transfer was not made in contemplation of or to take effect at death? Yes.

5. Did decedent, *at any time*, transfer any property in trust by deed or agreement? Yes.

6. Did decedent, individually or jointly with another, at the time of death, possess the right to exercise any power of appointment vested in him or her under the will, deed or other instrument of another? No.

7. Did decedent, deputy, or joint renter, *within 6 months of death*, withdraw property or evidence of property from [fol. 19] any safe deposit box, registered either in decedent's individual name, jointly with another, or to which decedent had access by an agent or as agent for another, and make distribution of such property without having received an adequate, valuable consideration therefor? No.

It then lists the property held by the Central Hanover Bank and Trust Company under the trust deed of May 16th, 1929, at the time of the death. The property so listed consisted of securities of various companies totalling $372,325.69, to which are added bonds and mortgages and from which are deducted expenses on the settlement of the estate, making a net balance in the trust fund of $377,962.04.

The following examples are representative of the securities so held in the fund:

75 shares American Telephone & Telegraph Co.	$13,725.00
$5000. American Gas & Elec. Co. Gold Deb. 5%, 2028	5,375.00
8000. Brooklyn-Manhattan Trans. Corp. Coll. Trust, 4½%	8,330.00
12000. Michigan Central R. R. Co., 3½%, 1952	12,975.00
Part. B/M 890 Fox Street, N. Y. C.	8,100.00

For the purposes of this appeal, the balance of the securities comprising the trust be regarded as of similar nature to the above examples.

Schedule-D: Lists as deductions the sum of $25,363.80.

Schedule-E: Lists the surviving beneficiaries as follows: George Chew Atkins, The Woodlands, Bronto, Ontario; John Norton Atkins, Emerald Hodgson Hospital, Sewanee, Tenn.

[fol. 20] PREROGATIVE COURT OF NEW JERSEY

WILL OF GEORGE W. E. ATKINS

I, George W. E. Atkins, now residing in East Orange, in the State of New Jersey, do hereby make, publish and declare this my Last Will and Testament, hereby revoking all other wills and codicils by me at any time heretofore made.

First, I give and bequeath to my son George Chew Atkins, the one hundred shares of the capital stock, par value $100 per share, of The Woodlands Orchards, Ltd., which I now own, and I give and bequeath to my son John Norton Atkins the sum of Ten Thousand Dollars ($10,000) which may be paid either in cash or in such stocks or securities, at such values, as may be agreed upon by him and the other Executors. If, however, before my death, my son George Chew Atkins shall have purchased or caused to be purchased from me, and shall have paid for in cash at par, $100 per share, all of said one hundred shares of such stock, then this legacy of stock to him shall lapse, and in lieu thereof there shall be paid to him the sum of Ten Thousand Dollars ($10,000), either in cash or in such stocks or securities, at such values, as may be agreed upon by him and the other Executors. If either of my said sons shall predecease me, leaving issue surviving me, the surviving

issue shall take the legacy to which the parent would have been entitled, if living, per stirpes and not per capita.

Second. All the rest, residue and remainder of my property, real, personal and mixed, of whatsoever nature and wheresoever situated, I give, devise and bequeath to my Trustee hereinafter named, in trust, however, to hold, sell, invest and reinvest the same from time to time, to collect and receive the income therefrom, and

[~~fol. 21~~] (a) In case my wife Mary M. C. Atkins shall survive me—

My Trustee shall pay over to my said wife the net income from the trust estate in monthly payments in each year during her life. Upon the death of my said wife I give, devise and bequeath the principal of the trust estate to my said sons John Norton Atkins and George Chew Atkins, in equal shares in case both of them survive my wife, or if either of my said sons shall predecease my wife leaving issue her surviving, then I give, devise and bequeath to such issue the share to which the parent would have been entitled, per stirpes and not per capita; or if only one of my said sons, or surviving issue of only one of my said sons, shall survive my wife, I give, devise and bequeath to such surviving son, or to such surviving issue, per stirpes and not per capita, as the case may be, the entire trust estate.

(b) In case my wife shall not survive me, I give, devise and bequeath my entire residuary estate to my said sons John Norton Atkins and George Chew Atkins, in equal shares in case both of them survive me, or if either of my said sons shall predecease me leaving issue me surviving, them I give, devise and bequeath to such issue the share to which the parent would have been entitled to, per stirpes and not per capita; or if only one of my said sons, or surviving issue of only one of my said sons shall survive me, I give, devise and bequeath to such surviving son, or to such surviving issue, per stirpes and not per capita, as the case may be, the entire residuary estate.

[fol. 22] (c) In case upon my death neither my wife nor any son nor issue of deceased son of mine shall survive me, or in case upon the death of my wife, no son or issue of deceased son of mine shall survive her, then and in either case I give, devise and bequeath my entire residuary estate

to my brother John W. Atkins, of Key West, Florida, if he is then living, or if not, then to my heirs at law and next of kin.

(d) It is my will that the income from the trust created for my wife shall begin to accrue and become payable to her immediately upon my death, and during the period of the administration of the estate by my Executors I direct that the income be paid to her from time to time in such instalments as she may request. Upon the termination of the duties of the Executor, and the transfer of the principal to the Trustee, she shall be entitled to receive the entire balance of such income.

Provided always that if upon my death, my said wife is then physically or mentally incapable of transacting the necessary business of receiving and disbursing said income payable to her, then the same shall be paid to my said son John Norton Atkins, to be received and disbursed by him for the benefit, sustenance and maintenance of my said wife, during the remainder of her life. My Trustee shall be fully protected in relying upon any affidavit or written statement by any member of the family of my wife in respect to the existence or continuation of any such physical or mental incapacity, and until my Trustee shall have been notified in writing of the termination of any such physical or mental incapacity it shall be justified and fully protected in [fol. 23] paying over any portion of the income from the trust estate to said John Norton Atkins for expenditure for the benefit of my wife, such payments to be made to said John Norton Atkins in such amounts and in such manner as he may from time to time request in writing; and in any such case the written receipt of said John Norton Atkins for any payment or payments so made shall be full protection to my Trustee for the making of the same and my Trustee shall not be required to examine into the question of the necessity for any payment or payments so requested to be made nor in any way to supervise the expenditure by said John Norton Atkins of any money so paid over to him by my Trustee.

Third. I direct my Executors, out of my residuary estate, to pay all inheritance, transfer or succession taxes, duties or other charges which may be imposed by lawful authority with respect to the transfer of any of my property.

Fourth. The provisions herein made for the benefit of my wife shall be in lieu of dower.

Fifth. I nominate and appoint my sons George Chew Atkins and John Norton Atkins and Central Hanover Bank and Trust Company, a banking corporation organized and existing under the laws of the State of New York, and the survivors or survivor of them, or the one of them who may qualify and act hereunder, to be the Executors of this will, and said Ceneral Hanover Bank and Trust Company to be the Trustee of the trust hereby created. I give to my Executors, and the survivors or survivor of them, and to my Trustee, the following powers, authority and discretion, which may be exercised by them or it in either or both capacities, as often as may be necessary:

[fol. 24] To sell at public or private sale, upon such terms as my Trustee may consider advisable, any property, real or personal, of which I may die seized or possessed or in which my estate may be invested or reinvested; to invest and from time to time to reinvest any cash principal received or held by my Trustee, in such sound stocks (whether common or preferred), and in such bonds, securities and other property, real and personal, as my Trustee in its discretion may deem advisable, which shall be held subject to the trust hereby created, and my Trustee shall not be restricted in its choice of investments or reinvestments to such stocks and securities as are permissible investments or reinvestments to trustees by the laws of the State of New York, it being my intention to give my Trustee the same power of investment or reinvestment in real and personal property which I might myself possess and exercise in the management of my estate; to continue, in the discretion of my Trustee, to hold in trust any stocks, bonds, securities or other property, real or personal, in which my estate or any part thereof may be invested at the time of my decease; to participate in any reorganization, consolidation or merger of any corporation, the stocks, bonds or other securities of which may at any time be held in trust, and to receive and to continue to hold upon the trust hereby created, any stocks, bonds or other securities which may be allotted to my Trustee by reason of its participation in any such reorganization, consolidation or merger; to make partition, division or distribution in kind or in cash, or partly in kind and partly in cash, of any of my real

or personal property, and the determination of my Trustee as to the fairness and equality of any such partition, division [fol. 25] or distribution shall be conclusive upon all persons who may now or hereafter be or become interested in the trust estate as legatee, beneficiary or otherwise; to make, execute and deliver leases or renewals of leases of any real estate of which I may die seized, for terms not exceeding twenty-one years; to compromise, settle or arbitrate any claim or demand in favor of me or my estate or against me or my estate; to cause any stock or securities at any time held in trust, to be registered in the name of the nominee or nominees of my Trustee; to exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and to use such portion of the principle of the trust estate as may be necessary therefor, or in the discretion of my Trustee, to sell any such rights for the benefit of the trust estate. All stock dividends and all realized appreciation in the value of stocks, bonds or other securities, by sale or other disposition thereof, shall be considered principal, and not income. My Trustee shall not be required to set up any sinking or other fund to amortize or absorb the premium at which any property may have been purchased or may be held by my Trustee. My Trustee shall not be liable for loss or depreciation in value of any of the trust property or for any investment or reinvestment which it may make or may continue to hold, unless it shall have failed to act with reasonable care. In case of doubt as to the rights, duties or responsibilities of my Trustee, it may advise with counsel, and the opinion of its counsel shall be complete protection to my Trustee against liability for any action taken or omitted to be taken in reliance thereon.

[fol. 26] Neither my Executors nor my Trustee shall be required to give any bond or other security for the faithful performance of their duties, by any Court or in any jurisdiction where my estate or any part thereof may be administered.

In witness whereof, I have hereunto set my hand and seal this 16th day of May, 1929.

George W. E. Atkins. (L. S.)

Signed, sealed, published and declared by the said Testator, George W. E. Atkins, as and for his Last

Will and Testment, in the presence of us and of each of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses the day and year above written. Albert Stickney, 8 East 93rd St., N. Y. City; Clara E. Ludwig, 238 B. 118th St., Rockaway Park, L. I., N. Y.; Leslie F. Randolph, 17 So. Prospect St., Verona, N. J.

[fol. 27] PREROGATIVE COURT OF NEW JERSEY

AGREEMENT DATED MAY 16, 1929

This agreement made this 16 day of May, 1929 between George W. E. Atkins, now residing in East Orange, New Jersey, hereinafter called the Grantor, and Central Hanover Bank and Trust Company, a banking corporation organized and existing under the laws of the State of New York, hereinafter called the Trustee, Witnesseth:

The Grantor has herewith deposited with the Trustee certain property described in Schedule A hereto annexed, and now in the possession of the Trustee as a Safekeeping Account of the Grantor, receipt of which by the Trustee is hereby acknowledged, and which, together with such additional stocks, securities or other property which the Grantor may hereafter deposit with and/or convey to the Trustee subject to the trusts hereby created, shall be held by the Trustee and its successors and assigns, upon the trusts herein set forth.

1. The Trustee shall hold, manage, invest and reinvest the trust estate, and shall pay over the net income thereof to the Grantor in monthly payments in each year during his life.

(a) Upon the death of the Grantor, in case Mary M. C. Atkins, wife of the Grantor, shall survive him, the Trustee shall continue to hold, manage, invest and reinvest the trust estate, and pay over the net income therefrom to said wife of the Grantor in monthly payments in each year during her life, except that the Trustee shall, out of such net income, and as a current charge thereon, pay to the son of the Grantor, George Chew Atkins, (hereinafter called

George), in case he shall survive the Grantor, an annuity of $2,400 a year during his life, for a period not to exceed [fol. 28] the life of the Grantor's wife, payable in equal monthly instalments of $200 each, and shall in like manner, out of such net income, and as a current charge thereon, pay to the son of the Grantor, John Norton Atkins (hereinafter called John), in case he shall survive the Grantor, an annuity of $2,400 a year during his life, for a period not to exceed the life of the Grantor's wife, payable in equal monthly instalments of $200 each. *Provided always* that if upon the death of the Grantor, his said wife is then physically or mentally incapable of transacting the necessary business or receiving and disbursing said income payable to her, then the same shall be paid to his said son, John, to be received and disbursed by him for the benefit, sustenance and maintenance of his mother, the Grantor's said wife, during the remainder of her life. The Trustee shall be fully protected in relying upon any affidavit or written statement by any member of the family of the Grantor's wife in respect to the existence or continuation of any such physical or mental incapacity, and until the Trustee shall have been notified in writing of the termination of any such physical or mental incapacity it shall be justified and fully protected in paying over any portion of the income from the trust estate to John for expenditure for the benefit of the Grantor's wife, such payments to be made to said John in such amounts and in such manner as he may from time to time request in writing; in any such case the written receipt of John for any payment or payments so made shall be full protection to the Trustee for the making of the same and the Trustee shall not be required to examine into the question of the necessity for any payment or payments so requested to be made nor in any way [fol. 29] to supervise the expenditure by John of any money so paid over to him by the Trustee.

Upon the death of the Grantor's wife, the annuity payments shall cease, and the Trustee shall transfer, assign and pay over the principal of the trust estate to George and John, in equal shares, in case both of them shall survive the Grantor's wife, the surviving issue of George or John who may have died before the Grantor's wife to take the same share which their ancestor would have taken had he survived the Grantor's wife, *per stirpes*

and not *per capita;* or if only one of said sons of the Grantor, or the surviving issue of only one of said sons of the Grantor, shall survive the Grantor's wife, the Trustee shall transfer, assign and pay over the trust estate to such surviving son, or to such surviving issue, *per stirpes* and not *per capita,* as the case may be. In case upon the death of the Grantor's wife, neither George nor issue of George, nor John nor issue of John, shall survive the Grantor's wife, the Trustee shall transfer, assign and pay over the trust estate to the Grantor's brother, John W. Atkins, now a resident of Key West, Florida, if then living, or if not, then to the other heirs at law and next of kin of the Grantor.

(b) In case the Grantor's wife shall not survive the Grantor, the Trustee shall, upon the Grantor's death, divide the trust estate into equal shares, to be disposed of as follows:

In case George shall survive the Grantor, the Trustee shall transfer, assign and pay over to George one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor). In case George shall not survive the Grantor, [Vol. 30] but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita,* one of such equal shares (or the entire principal of the trust estate in case neither John nor issue of John shall survive the Grantor).

In case John shall survive the Grantor, the Trustee shall transfer, assign and pay over to John one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor). In case John shall not survive the Grantor, but shall leave issue surviving the Grantor, the Trustee shall transfer, assign and pay over to such surviving issue, *per stirpes* and not *per capita,* one of such equal shares (or the entire principal of the trust estate in case neither George nor issue of George shall survive the Grantor).

(c) In case neither the Grantor's wife, nor George nor issue of George, nor John nor issue of John, shall survive the Grantor, the Trustee shall transfer, assign and pay over the entire trust estate to the Grantor's brother, John W. Atkins, if then living, or if not living, then to the other heirs at law and next of kin of the Grantor.

2. The Trustee shall have the following powers, authority and discretion, namely: To continue to hold upon the trust hereby created any or all of the property herewith or hereafter transferred to the Trustee in trust; nevertheless, in case it shall seem to the Trustee advisable to sell or dispose of said property, in whole or in part, the Trustee may from time to time sell or dispose of the same or any property which may at any time constitute the trust estate. The [fol. 31] Trustee shall invest and from time to time reinvest the proceeds of sale of any of the trust property or any cash funds held in trust, in such sound stocks or securities as may seem to the Trustee advisable, which shall be held subject to the trust hereby created, and the Trustee shall not be restricted in making investments or reinvestments of trust funds to such stocks or securities as are permissible investments for trustees by the laws of the State of New York. The Trustee may become a party to any reorganization, consolidation or merger of any corporation, the stocks or securities of which may at any time be held in trust, and may participate in any such reorganization, consolidation or merger to the same extent and as fully as though it were the absolute and individual owner of such stocks and securities, and may receive upon any such reorganization, consolidation or merger and thereafter continue to hold in trust any property allotted to the Trustee as provided by the terms thereof. The Trustee shall not be liable for any loss or depreciation in the trust estate occurring by reason of error of judgment in making any investment or reinvestment or in continuing to hold in trust the property herewith or hereafter transferred to the Trustee or any investment or reinvestment hereafter made, unless it shall have failed to act with reasonable care. The Trustee shall not be required to establish any sinking fund to amortize the premium at which any investment or reinvestment may be purchased. All stock dividends declared upon any stocks held in trust shall be considered principal, and not income. The trustee shall not be liable for the consequences of any action taken or omitted to be taken by it in good faith in the administration of the trust hereby created, and it may consult with counsel and shall [fol. 32] be protected in any action taken or omitted to be taken in accordance with and in reliance upon the opinion of counsel. The Trustee is authorized to pay out of the

income received from the trust estate, or out of principal if the income should not be sufficient therefor and for necessary living expenses of Mary M. C. Atkins at the same time, any and all taxes which may be properly assessed against the trust estate or any beneficiary thereof. The Trustee may exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and may use such portion of the principal of the trust estate as may be necessary therefor or in the discretion of the Trustee, may sell any such rights for the benefit of the trust estate. The investments made through the exercise of any such rights shall be considered principal. The Trustee may cause any stocks or securities at any time held in trust, to be registered in the name of the nominee or nominees of the Trustee. The Trustee may compromise, adjust, settle and compound on such terms as may seem advisable to it in its discretion, any claims in favor of the trust estate or against the trust estate. The Trustee may make distribution of the trust estate in kind or in cash, or partly in kind and partly in cash, and the determination of the Trustee as to the fairness and equality of any such distribution shall be conclusive upon all persons entitled to receive any share of the trust estate. The trustee shall not be required to furnish any bond or security for the performance of its duties hereunder.

The Trustee shall be entitled to receive, as compensation for its services in the administration of the trust, a commission of two per centum (2%) per annum upon all [fol. 33] income received by it, and upon the death of the survivor of the Grantor and the Grantor's wife a commission of one per centum (1%) upon the market value of the trust estate.

During the lifetime of the Grantor, the Trustee shall, except in case of emergency or during the absence or disability of the Grantor, consult with the Grantor in reference to the sale or other disposition of trust property or the investment or reinvestment of trust funds.

X. This indenture shall be construed according to the laws of the State of New York, where it is made and where it is to be enforced.

In witness whereof the Grantor has hereunto set his hand and seal, and the Central Hanover Bank and Trust Com-

pany has caused these presents to be executed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, the day and year above written.

George W. E. Atkins, (L. S.) Central Hanover Bank and Trust Company, by S. A. Brown, Vice-President, (Corporate Seal.) C. J. Farrell, Assistant Secretary.

[fol. 34] State of New York,
County of New York, ss:

On this 16 day of May, 1929, before me personally came George W. E. Atkins, to be known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

S. A. Collins, Notary Public. Notary Public Bronx Co. No. 74 Reg. No. 3071. Cert. filed in N. Y. County No. 418 Reg. No. 0-305. Cert. filed in Westchester County. Commission expires March 30th, 1930.

State of New York,
County of New York, ss:

On this 16 day of May, 1929, before me personally came S. A. Brown, to me personally known, who being by me duly sworn, did depose and say, that he resides in Leonia, N. J.; that he is a Vice-President of Central Hanover Bank and Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation and that he signed his name thereto by like order.

S. A. Collins, Notary Public. Notary Public Bronx Co. No. 74 Reg. No. 3071. Cert. filed in N. Y. County No. 418 Reg. No. 0-305. Cert. filed in Westchester County. Commission expires March 30th, 1930.

[fol. 35] SCHEDULE A

$10,000. N. Y. Title & Mortgage Co. Gtd. 1st Mtge. Ctf. 2284 S F-1, 5½% 5/1/1939 M & N 1	$10,500. Carolina Power & Light Co. 1st & Refg. Mtge. 5% 4/1/1956 A & O 1
$ 5,000. American Ice Co. S/F Gold Deb. 5% 6/1/1953 J & D 1	$10,000. Chi. Ind. & Louisville Ry. Co. Ref. 6% 7/1/1947 J & J 1

In addition to the above, there are 60 items of similar domestic securities enumerated, with a par value of $389,800.00, and one foreign, to wit, Paris-Orleans R. R. Co. 6% 1956, having a par value of 27,000 francs.

[fol. 36] PREROGATIVE COURT OF NEW JERSEY

ANALYSIS OF TAX

STATE OF NEW JERSEY
STATE TAX DEPARTMENT
TRANSFER INHERITANCE TAX BUREAU

ASSESSMENT

Estate of George W. E. Atkins of Essex County
Late Resident of East Orange. Date of Death November 9, 1936

Amount of Estate	Real	$		
	Personal	216,802 88		
	Transfers	405,600 34	TOTAL	$622,403 22
Debts, Expenses, &c				20,937 04
Net Taxable Estate				601,466 18
Exempt Interests				10,000 00
Taxable Interests				591,466 18
Tax			1-2-3-4-5-6%	$ 19,998 05

Will and transfers to take effect at death.

ANALYSIS OF TAX

	Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Age	Exempt	Taxable
	Payment of debts George C. Atkins.		Son		$5,000 00	$293,991 86
W 1	Specific bequest—stock	$6,187 74				9,899 59
	Gifts to take effect at death as follows:					
	½ corpus of trust fund under deed dated 5/16/29	188,458 52				
	½ commuted value of (Equitable) policies #9,142,731, 9,260,836 & 9,545,296 and (N. Y. Life) policy #303,553	10,367 88				
	Commuted value of (Equitable) policy #8,948,433	4,138 67				
W 2	½ Residue	89,839 05				
		$298,991 86				

(Rubber Stamp)
Assessment Dated 2/11/38
Assessed by H. E. ROWLEY
Re-Audited by

[fol. 37]

STATE OF NEW JERSEY

STATE TAX DEPARTMENT

TRANSFER INHERITANCE TAX BUREAU

ASSESSMENT

Estate of George W. E. Atkins of Essex County
Late Resident of East Orange. Date of Death November 9, 1936
Will and transfers to take effect at death.

ANALYSIS OF ESTATE

Beneficiaries and Bequests	Value of Devise or Bequest	Relationship	Age	Exempt	Taxable
John M. Atkins		Son		$ 5,000 00	$297,474.32
W 1 Cash	$ 10,000 00				10,098.46
Gifts to take effect at death as follows—					
½ corpus of trust fund under deed dated 5/16/29	188,458 52				
½ commuted value of (Equitable) policies #9,142,731, 9,260,836 & 9,545,296 and (N. Y. Life) policy #303,553	10,367 88				
Commuted value of (Equitable) policy #8,877,293	3,808 87				
W 2 ½ Residue	89,839 05				
	$302,474.32			$10,000 00	$591,466.18
					$ 19,998.05

COMPUTATION OF TAXES

George C. Atkins		John M. Atkins	
$ 5,000 00 Exempt		$ 5,000 00 Exempt	
45,000 00 @ 1%	$ 450 00	45,000 00 @ 1%	$ 450 00
50,000 00 @ 2%	1,000 00	50,000 00 @ 2%	1,000 00
50,000 00 @ 3%	1,500 00	50,000 00 @ 3%	1,500 00
50,000 00 @ 4%	2,000 00	50,000 00 @ 4%	2,000 00
98,991 86 @ 5%	4,949 59	100,000 00 @ 5%	5,000 00
		2,474 32 @ 6%	148.46
$298,991 86	$ 9,899 59	$302,474 32	$10,098 46

[fol. 38] PREROGATIVE COURT OF NEW JERSEY

In the Matter of THE STATE OF NEW JERSEY INHERITANCE TAX ON THE ESTATE OF GEORGE W. E. ATKINS, Deceased

AFFIDAVIT OF C. L. HERTERICH

C. L. Herterich, being duly sworn deposes and says: That he is an Assistant Vice President of Central Hanover Bank & Trust Company, one of the executors of the Estate of George W. E. Atkins, deceased, who died November 9, 1936, a resident of the County of Essex, State of New

Jersey, and his will was admitted to probate in the Surrogate's Court, County of Essex, State of New Jersey, on December 10, 1936, wherein George Chew Atkins, John Norton Atkins and Central Hanover Bank & Trust Company were appointed and duly qualified as executors of his Estate;

That an affidavit with schedules annexed was filed with the Transfer Inheritance Tax Bureau, State of New Jersey, for the purpose of the assessment of whatever State of New Jersey Inheritance Tax might be due by the said Estate;

That attached to said affidavit and schedules was a copy of a trust agreement dated the 16th day of May, 1929 between George W. E. Atkins, then residing in East Orange, N. J., Grantor, and Central Hanover Bank & Trust Company, a banking corporation organized and existing under the laws of the State of New York, Trustee, together with a statement of securities composing the assets of the trust fund on the date of its inception, as well as a statement of cash additions to the trust fund;

[fol. 39] That the said trust agreement was duly executed by the said George W. E. Atkins and Central Hanover Bank & Trust Company in the State of New York;

That Paragraph 3 provided "this indenture shall be construed according to the laws of the State of New York where it is made and where it is to be enforced";

That the majority if not all of the securities which composed the assets of the trust fund on the date of its inception, May 16, 1929 had previously been held in a safekeeping account in the name of George W. E. Atkins with the Central Hanover Bank & Trust Company, and that the said safekeeping account of the said George W. E. Atkins was opened with the Central Union Trust Company, the predecessor of Central Hanover Bank & Trust Company, on or about the 15th day of May, 1924 and had been continuously used by the said George W. E. Atkins until the creation of the said trust agreement whereby all of the securities in said safekeeping account were transferred to the Central Hanover Bank & Trust Company as trustee under the agreement dated May 16, 1929;

That the said securities were at all times physically held by said Central Hanover Bank & Trust Company within the City and State of New York, both while in said safekeeping

account and thereafter while constituting part of the assets of the trust fund.

C. L. Herterich.

Sworn to before me this 8th day of April, 1938. J. Rown Koeppe, Notary Public, Westchester County. Cert. filed in N. Y. Co. No. 644, Reg. No. O-K-380. Cert. filed in Bronx Co. Reg. No. 137-K-40. Cert. filed in Niagara County. Commission expires March 30, 1940.

[fol. 40] PREROGATIVE COURT OF NEW JERSEY

SUPPLEMENTAL AFFIDAVIT OF C. L. HERTERICH

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

C. L. HERTERICH, being duly sworn, deposes and says:

That he is an Assistant Vice-President of Central Hanover Bank and Trust Company, one of the Executors of the above named decedent; that he has heretofore made an affidavit herein, sworn to the 8th day of April, 1938, with respect to the trust agreement dated May 16, 1929 entered into between the decedent and said Central Hanover Bank and Trust Company; and that he now makes this supplementary affidavit for the purpose of giving further details with regard to the administration of the trust created by said trust agreement.

That since the execution of said trust agreement, which took place in the City and State of New York, not only have the assets constituting the trust fund been at all times physically held within the State of New York, as set forth in said prior affidavit, but the trust with respect to the same under said agreement has been at all times wholly administered and carried on within the State of New York, namely, at the office of the Trustee, the said Central Hanover Bank and Trust Company, at 70 Broadway, in the Borough of [fols. 41-82] Manhattan, City and State of New York. All decisions and directions of the Trustee with respect to the trust have been made in the City of New York; all investments and changes of investments were made in said City;

all books and records pertaining to the trust fund have been kept in said City; the office of the Trustee in said City was given as the address of the Trustee on the books of the various corporations in which stock has been held; all dividend checks were received and all bond coupons were defached from their respective bonds in said City and the same deposited for collection in said City; all payments of income to the beneficiary-grantor have been made at or from the office of the Trustee in said City; and no acts with respect to said trust agreement have at any time been performed by the Trustee within the State of New Jersey.

C. L. Herterich.

Sworn to before me this 27th day of June, 1938. J. Rowan Koeppe, Notary Public, Westchester County. Cert. filed in N. Y. Co. No. 644, Reg. No. O-K-380. Cert. filed in Bronx Co. Reg. No. 137-K-40. Cert. filed in Niagara County. Commission expires March 30, 1940. (Seal.)

[fol. 83] New Jersey Prerogative Court

[Title omitted]

Conclusions—Filed February 14, 1941

Transfer Inheritance Tax Appeal on Final Hearing

Messrs. Child, Riker, Marsh & Shipman, for appellants.

Mr. David T. Wilentz, Attorney General.

Mr. William A. Moore, Assistant Attorney General, for respondent.

Buchanan, *V.-O.:*

This is an appeal from the transfer inheritance tax levied in the estate of George W. E. Atkins, deceased, who died [fol. 84] testate, domiciled in this state, November 9, 1936. Tax was assessed against the transfer under his will of property valued at a little less than $200,000; also against the transfer of property passing under an *inter vivos* trust deed executed and delivered on May 16, 1929; and also against transfers made to decedent's two sons under cer-

tain "refund annuity" agreements between decedent and certain respective insurance companies.

There is no dispute as to the tax on the testamentary transfers, nor as to amounts or computation as to the other transfers; the only questions in issue are (1) the taxability of the transfers under the trust deed, and (2) the taxability of the transfers under the refund annuity agreements.

The Refund Annuity Transfers

First as to the transfers under the refund annuity agreements. There were six of these agreements, or "policies," with two insurance companies, all essentially alike, purchased in the period between July, 1932, and October, 1935. The decedent paid a lump sum, called the "capital investment", to the insurance company and received in consideration thereof an agreement whereunder the company bound itself to pay to the annuitant certain fixed, equal, monthly payments during his life, and if the annuitant should die before receiving monthly payments aggregating the amount of the "capital investment", to continue the monthly payments after his death until the total of said payments equalled the amount paid in; the payments, (if any), subsequent to Mr. Atkins' death were to be made to his two [fol. 85] sons, as beneficiaries designated by Mr. Atkins; and the right was reserved to Mr. Atkins to change the said beneficiaries during his life.

It seems clear that the transfers to the two sons, under these contracts, are gifts *inter vivos* "made in contemplation of the death of the donor"; and they are also gifts "intended to take effect in possession or enjoyment at or after such death." Under our statute they are therefore taxable in either of those aspects.

That these are, in substance and effect, transfers by the decedent, although the actual payments to the sons are to be made by the insurance company, is obvious. The payments (if any) to be made to the sons, constitute repayment by the company of the equivalent of so much of the capital sum invested by decedent as has not previously been repaid to the decedent himself. That which is to be paid by the company to the sons is in substance and effect, simply that which the decedent has paid to the company and directed the company to pay to the sons. If otherwise taxable, these transfers are not saved from taxability because made

through the medium of a third party. *In re Gemmell*, 123 N. J. Eq. 315, and cases cited at page 321, 197 Atl. Rep. 428.

By the express terms of the contracts the sons take nothing thereunder until the death of the annuitant grantor; that which comes to them comes only at and after his death. It is a supererogation to say that these gifts were intended by decedent to take effect in possession or enjoyment at or after his death. He intended that which he expressly provided.

It is equally clear that these (contingent) gifts to the sons were made by the donor in contemplation of his death. [fol. 86] It may be conceded that he had no apprehension of death other than as an event certain to occur at some time in the indefinite future. A transfer is taxable under that clause, however, if made in and because of such contemplation of death as that which leads to testamentary disposition—if made with the intent and purpose that it be in lieu of testamentary disposition. *Schweinler* v. *Martin*, 117 N. J. Eq. 67, 175 Atl. Rep. 71; aff'd 13 N. J. Misc. 722, 180 Atl. Rep. 774; *In re Hartford*, 122 N. J. Eq. 489, 194 Atl. Rep. 800; *Nicholas* v. *Martin*, 128 N. J. Eq. 344, 15 A. 2d 235.

That these transfers to the sons in the instant case were made in lieu of testamentary disposition is indisputable; they are specifically, expressly and solely, provisions as to the *post mortem* disposition of a part of the assets of his estate—the value, at his death, of the unpaid instalments under the contracts.

Appellants contend that these transfers are not taxable because the primary purpose and motive of the decedent in taking out these contracts was to make provision for himself for life, not to provide a distribution of his property after his death.

If this contention were sound it would of course be of no practical benefit to appellants, for it still would remain true that the gifts would be taxable as being intended to take effect in possession or enjoyment at or after death. However it is not sound, and hence not efficacious to preclude taxability of the gifts as made in contemplation of death.

As pointed out, and held, in *Nicholas* v. *Martin*, *supra*, it is not a requisite of taxability on this ground, that the transferor's primary object and purpose in making a [fol. 87] transfer which is in fact made and intended as in

lieu of a testamentary disposition, should have been to make provision for the *post mortem* distribution of his estate (or a part thereof); it is sufficient if he in fact, regardless of what may have been his primary object in so doing, makes a transfer which is in fact made and intended as in lieu of a testamentary disposition.

Moreover, in the instant case, this contention of appellants is unsound, because we are here concerned not with the provision for repayment from the company to the annuitant during his life, but simply with that part of the transaction which provides for the contingent, eventual *post mortem* payment to the sons. It is only this latter transfer which has been taxed. If the contract had not contained this provision, but had instead provided that any portion of the capital investment which had not been repaid to the annuitant during his life, should at his death be paid to his estate,—his executors or administrators,— there would have been no taxable transfer in and by the contract. In that case such unrepaid balance would pass under his will and be taxable as a testamentary transfer. The decedent however did not so provide: instead he made a conscious choice between such provision and a provision for *post mortem* distribution to his sons, decided in favor of the latter, and acted accordingly—thus making, by this provision of the contract, a transfer intentionally in lieu of testamentary disposition,—taxable as made in contemplation of death under the established intent and meaning of the statute.

Appellants rely on the principle, set forth in such cases as *In re Kellogg*, 123 N. J. Eq. 322, 197 Atl. Rep. 263, (and the cases therein cited on p. 325), that where a transferor [fol. 88] makes *inter vivos* an absolute, immediately effective transfer of property in exchange for an agreement by the transferee to pay an annual sum to the transferor during the transferor's life, the transfer is not taxable (under the "intended to take effect at death" clause), unless the annual sum to be paid to the transferor comes from or is connected with or dependent upon the corpus or income of the actual property transferred.

That principle, and those cases, obviously have no application here. Those cases deal with the taxability of a transfer from the transferor to the original transferee where the transferor retains or receives back something which is similar to the beneficial enjoyment, dur-

ing his life; of the property transferred,—thus raising the question as to whether or not the transferor intended the ultimate transfer of actual beneficial enjoyment to the transferee to take place only at or after the transferor's death. They do not involve any promise by the transferee to pay over or transfer something *to a third party at the transferor's death*. The present case does; and the thing which the transferee agrees to pay over to the third party is a part of, or "identifiably tied up with", and dependent upon, the property transferred by the transferor to the original transferee.

The present case is in effect, (insofar as concerns that portion of the original transfer which is not repaid to the transferor during his life), a (contingent) transfer, through an intermediary, to the third party to take effect only at the transferor's death.

The situation is no different as to taxability even if it be deemed that the sum or amount which the insurance [fol. 89] company agreed to pay to the sons, is not actually a part of, or identifiably tied up with, the thing transferred by the annuitant for the insurance company. The transferor, under the agreement of the insurance company, had a right to have repaid to himself or to his estate, the amount of the capital investment in equal annual payments,—because there was reserved to him the right to change the *post mortem* beneficiaries. That right, at the moment of the transferor's death, was of the value of the balance then remaining unpaid; and that right (and the value thereof) actually ultimately passed to the two sons only at the annuitant's death,—because he had not until then lost the right to revoke the beneficence to the son. *Cf. Kings County Trust Co.* v. *Martin*, 124 N. J. L. 290, 2 A. 2d 187; *Graves* v. *Elliott*, 307 U. S. 383.

This also disposes of the contention put forward in appellants' brief, to the effect that the interest passing to the sons is not taxable because its passing to them was only contingent, and that, under the mortality tables and their father's age and expectancy of life, the value of their expectancy of receiving anything thereunder was *nil*, at the time their father made the agreements.

Irrespective of all this of course, the transfer to the sons is still taxable as made in contemplation of death.

Appellants further contend that these transfers to the sons are not taxable, because (they say) proceeds of life

insurance policies passing to named beneficiaries are exempt from taxation and because these annuity agreements are (they say) life insurance policies. In that contention this court cannot concur. The applicable statutory pro-
[fol. 90] visions are those found in R. S. 54:34-4, *b* and *c*: (subsections *f* and *g* were not passed until 1939).

These statutory provisions for exemption existed in precisely the same form prior to the Revision of 1937, and were in force and effect during the period of the making of the annuity agreements in question, and also at decedent's death. They are not, however, applicable to the situation *sub judice*, because this situation does not involve any trust deed, trust agreement or trust fund, and especially it does not involve any trust fund resulting "from the proceeds of contracts or insurance * * * insuring the life of decedent and payable at or after the death of decedent to the trustee" under such trust agreement.

Not only do the contracts under consideration create no trust fund, nor provide for any payment to any trustee nor for the benefit of any *cestui que* trust, but they are not even "contracts of insurance * * * insuring the life of decedent."

It may be assumed for the sake of argument that the transfer to named beneficiaries, of proceeds of life insurance policies, would not be taxable, even though under such policies the insured retained the right to change the beneficiaries—*Cf. In re Gemmell*, 123 N. J. Eq. 315, 197 Atl. Rep. 428, at pages 319 *et seq.*; but the contracts in question are not life insurance policies. A life insurance policy is a contract whereby the insurance company agrees to insure or indemnify the beneficiary against the death of the insured; it is a contract by which the insured protects the beneficiary against loss accruing by the early or premature death of the insured. The refund annuity contract such as we are here considering is very different. By it the insurance company agrees to repay to the annuitant, in
[fol. 91] instalments during his life, the amount paid in by him to the company, and if at his death there be a balance unpaid to him, to pay that balance to the person designated by the annuitant to receive the same. It is a contract by which the annuitant protects *himself, during his life*, by making an investment which will assure the receipt *by himself*, of an adequate or desired annual sum during his

life, with the further assurance that if he should die prematurely, his estate or those whom he desires to receive distribution thereof, will not suffer the loss of the repayment he has himself not yet received. In the judgment of this court this is not a life insurance policy.

The question is *res nova* in this state. There are authorities *pro* and *con* in other jurisdictions, but those in accord with the conclusion herein reached are deemed to have the support of better logic and reason.

Reference is made by appellants to the fact that the amounts passing to the sons under these agreements, constitute only a small part of decedent's estate. If by this it is meant to suggest that the transfers are for that reason not taxable, the suggestion is unsound. The statute provides that transfers *inter vivos* of a material portion of the transferor's estate, under certain circumstances shall be *prima facie* deemed to have been made in contemplation of death. But there is no provision, express or implied, which says that a transfer which is in fact made in contemplation of death or intended to take effect at or after death, shall not be taxable unless it be of a material portion of the transferor's estate. Moreover, the transfers to the sons in the instant case aggregate some $28,600.—a sum which is by no means *de minimis*, either actually or [fol. 92] in relation to the assets of approximately $200,000. at that time owned by decedent.

The Trust Deed Transfers

Next as to the taxability of the transfers under the deed of trust. This deed was executed and delivered by decedent on May 16, 1929, in the State of New York. Admittedly the entire property conveyed thereby consisted of intangible personality, the legal title to which, and the beneficial ownership of which, was in the grantor, who was then and for a considerable time prior thereto had been, a domiciled resident of New Jersey. The "securities" or paper evidence of ownership of this intangible personality were at that time, and for some time previously, and at all times subsequently until the death of decedent, physically located in the State of New York. Prior to the making of the deed they had been in the custody of an agent of said owner. The trustee was a corporation of, and having its office in, the State of New York. The trust deed

provides by its express terms that it is to be construed according to the laws of the State of New York. Decedent, grantor of the trust, continued to be domiciled and resident in New Jersey at all times subsequent to the execution and delivery until and at the time of his death.

The trust deed provided, in essence, for an equitable life estate to the grantor for life, and thereafter to his wife for life (if she survived him), and that the corpus in remainder be paid to the grantor's two sons if living—with substitutionary gift over in case of their prior death. The wife predeceased the grantor; the two sons both survived him.

[fol. 93] The tax levied and assessed with respect to the transfers under this deed of trust, and as to which the present appeal is taken, was as to the transfers of the remainder interests to the two sons.

The specifications of alleged error, or the grounds of this appeal, as set forth in the petition of appeal, may be more succinctly set forth as follows:

The property which comprised the trust fund was located outside the territorial limits of New Jersey at the time of execution of the trust deed; the trust deed was executed outside of New Jersey; the legal title to the property transferred by that deed was transferred to a corporation domiciled in New York; the legal title to the property and the possession thereof has at all times since remained in that trustee entirely outside of New Jersey; and under these circumstances

a. the transfer of the trust property is not made taxable under the provisions of our statute.

b. the state of New Jersey had no constitutional power to tax the said trust property because the *situs* thereof at the time of taxation was not within the territorial limits of this state.

c. if the provisions of our statute authorize or direct the taxation of the property of the trust fund, then such provisions and such taxation are unconstitutional, because a state has no power or jurisdiction to tax property, or the transfer of property, when such property is located, or such transfer is made outside the limits of its own territorial boundaries.

[fol. 94] Not much time need be spent in considering b. above—inasmuch as no tax was here imposed on the *property*. The tax appealed from was imposed upon the *transfer* of certain interests in property.

Moreover, even if the tax had been imposed on the property itself (presumably, appellants mean the property which was conveyed by the grantor to the trustee), the allegation is unsound. That property was admittedly *intangible* personalty; and the power to tax such property inheres in the state of the domicile of the owner thereof. *Curry* v. *McCanless*, 307 U. S. 357, at 368, and 370.

As to a., above—reference to the provisions of the statute will show that this allegation—(that the statute does not purport to impose a tax such as that here *sub judice* in the situation and circumstances present in the instant case)—is without foundation. On the contrary, such a transfer clearly comes within the scope of the express terms of subsection first, of section 1, of the statute in force and effect at the date of the transfer and the date of the transferor's death—P. L. 1909, C. 228, p. 325, as amended. (It is also to be noted that it comes within the scope of the express language of the corresponding sections of the present statute—R. S. 54:34-1 c. and d.)

The statute (see section 1 thereof) expressly imposes tax, *inter alia*, upon every transfer of any property of the value of $500, or of any interest therein or income therefrom, made by a resident, by deed made in contemplation of the grantor's death or intended to take effect in enjoyment at or after such death. Under the express words of the statute therefore, the tax is imposed on the transfers made by the present deed of trust, because that deed [fol. 95] was made by a resident of New Jersey; it transferred to the trustee property of the value of over $500, and also transferred to the two sons contingent equitable interests in remainder in that property (which interests were also of the value of over $500); and these transfers of the equitable interests to the two sons were made by deed made in contemplation of the grantor's death and also they were intended to take effect in enjoyment or possession at or after such death.

That these transfers to the sons were intended to take effect in possession or enjoyment at or after the grantor's death is obvious; the trust deed expressly so provides, and hence necessarily intends. That they were made in con-

templation of the grantor's death is equally beyond doubt. The grantor was aged 79 at the time he made the deed; the deed provides for the *post mortem* distribution of the trust fund; the trust fund comprised some $390,000 or approximately two-thirds of his estate; and the deed was executed contemporaneously with the execution of his will which provides likewise for the *post mortem* distribution of the bulk of his testamentary estate to the wife for life with remainder to the sons. See *Schweinler* v. *Martin*, 117 N. J. Eq. 67, 175 Atl. Rep. 71; aff'd, 13 N. J. Misc. 722, 180 Atl. Rep. 774; *In re Hartford*, 122 N. J. Eq. 489, 194 Atl. Rep. 800; aff'd, sub nom. *Hartford* v. *Martin*, 122 N. J. L. 283, 4 A. 2d 31; *In re Fischesser*, 14 N. J. Misc. 815, 187 Atl. Rep. 648; *Nicholas* v. *Martin*, 128 N. J. Eq. 344, 15 A. 2d 235. The nature of these transfers is at least tacitly admitted by appellants; who likewise do not controvert the proper appraisal, computation and levy of the tax, if the transfer is constitutionally subject to the operation of the statute. [fol. 96] It must needs also be admitted by appellants,—and indeed they do not contend otherwise,—that there is nothing in the provisions of our statute which expressly or impliedly exempts from taxation, such transfers as the one here under consideration.

The real contention of appellants is that the transfers by the trust deed are not subject to the taxing power of New Jersey because that deed and the transfers thereby made were made and took place outside the territorial boundaries of this state; were made to a non-resident trustee; by a deed which expressly provided it should be construed according to the laws of New York; and the property transferred was then, and at all subsequent times, outside the territorial boundaries of this state; further, that the transfers of interest to the sons did not take place until the death of the grantor, inasmuch as the interests given to the sons were contingent upon the sons surviving the grantor, and until his death leaving them surviving, no gift vested in them; that at grantor's death he was not the owner of the property conveyed by the trust deed, (legal title to which was then in the New York trustee); hence New Jersey could not validly impose a tax upon that transfer at the grantor's death, notwithstanding the statute purports so to do.

The power of a state to impose a tax upon property, or upon the owner of property, rests upon the dominion and control of that state over that property or over the

owner. See *Curry* v. *McCanless*, 307 U. S. 357, at page 366.

Although there is of course a difference between a tax on property and a tax on the transfer of property, that difference is not material on this matter of sovereignty based [fol. 97] on control. A state which by reason of physical control over property within its borders, has the power to tax that property, must equally have power to tax the transfer of such property, because by reason of its physical control, it can (except as forbidden by the federal constitution), impose conditions upon, or prescribe the methods necessary to accomplish, or even *forbid* completely, the transfer of that property. *Cf.* statutes forbidding the ownership of real estate by aliens, or by foreign corporations, and the like; also the statutes prescribing necessary requisites for accomplishing conveyance, by will or by deed, of property within the state's borders.

Since it is the state in which the property is situate which has the power and right to prescribe the requisites for accomplishing a transfer of that property, it seems clear that if that state does not include among such requisites some provision as to the place *ichere* that act of transfer must necessarily be made in order that the transfer be valid and effectual (assuming that such a provision would be constitutional) it is utterly immaterial where that act of transfer is performed so long as it complies with such other requisites as the state of *situs* has prescribed. Conveyances of real property in New Jersey are constantly made both by deeds executed outside of this state and by wills of decedents who are non-residents of New Jersey, and no one has ever suggested that their validity might be open to question because they were not made in the state of New Jersey; on the contrary, that their validity is not subject to question on that ground is indicated by the statutory provisions for the recording in this state of foreign wills and [fol. 98] for the taking of acknowledgments in foreign states of deeds conveying New Jersey real estate, and the like.

Inasmuch, then as New Jersey, having the power to prescribe the methods and requisites necessary to accomplish a valid transfer of property within its borders, and the power to tax such a transfer has not included in the necessary requisites for effectuating a valid transfer any requirement that the act of transfer must be performed within this state, it follows that an act of transfer performed outside this state, if it in all other respects com-

plies with such provisions as New Jersey has made requisite to effectuate a valid transfer, does accomplish a valid transfer and a statutory tax imposed by New Jersey upon transfers of property located in this state will apply to and be operative upon that transfer just as much as on a valid transfer effectuated by an act performed in New Jersey.

Therefore the fact that in the instant case the act effectuating the transfer was performed in New York, by the execution and delivery there of the trust deed, is a matter of no moment so far as concerns the validity of the tax. No constitutional provision is cited, or known, which would make it requisite to the validity of a tax imposed by New Jersey upon the transfer of New Jersey property, that the act of transfer must take place in New Jersey; our taxing statute provides for no such limitation; there appears no logical reason, nor any reported adjudication by the courts of this state or of the United States, to support the contention that such a limitation should be inferred. The only authority proffered by appellants in support of their contention in this behalf, is the case of *Cutts* v. *Najdrowski*, [fol. 99] *123 N. J. Eq. 481, 198 Atl. Rep. 885, and the case of *MacClurkan* v. *Bugbee*, *106 N. J. L. 192, 150 Atl. Rep. 443—but neither of these cases in fact affords any such support.

In the *MacClurkan* case, a deed of trust, irrevocable for five years, was made in Illinois by a grantor who then resided in Illinois, which comprised no property located in New Jersey. The question before the court was as to the validity of a transfer tax by this state on the transfer made by a non-resident, of a contingent interest which became vested at the death of the grantor, the grantor having meanwhile become a resident of New Jersey and died within the five-year period of irrevocability. Since the deed when made comprised no property located in New Jersey it did not come within the scope of the provisions of the New Jersey statute relating to tax on transfers made by non-residents. It was held that it also did not come within the scope of the provisions for the taxation of transfers by residents, because the trust deed when made was made by a non-resident, who, though she later became a resident, never had any power or control over the transfers provided in that deed, and although the contingent life estate vested while she was a resident, it did so by reason of the deed of trust made when she was a non-resident, and not by rea-

son of any act or failure to act by the grantor while such resident, and not because of any privilege granted, or power of nullification withheld, by the state of New Jersey. It is clear therefore that, notwithstanding the opinion includes considerable discussion as to the circumstances in which a state has the constitutional right or power to impose a transfer tax, the decision does not in any wise hold, and [fol. 100] cannot be deemed authority for the principle that, a transfer of property located in this state, made by an owner domiciled in this state, cannot validly be taxed by this state if that transfer is made in another state.

In the other case cited by appellants—*Cutts* v. *Najdrowski*, *supra*—the factual situation was that L., a New Jersey resident, who owned a bank deposit standing in his name in a New York bank, caused the account to be changed to the credit of "L. in trust for J." The question was whether this act of L. constituted or accomplished a valid transfer to J. of the ownership of the account. The actual decision was that under the law of New York it did constitute such valid transfer; and that the question of the determination of the nature, validity and effect of the transaction was one which was governed and controlled by the law of the State of New York. It does not appear from the opinion *what* the act of transfer was, nor—except by possible implication—that it *was* made in New York; and it is not clear from the opinion whether the reason for holding that the law of New York controlled was because the act of transfer was made in the State of New York, or because the court found that the property transferred (notwithstanding it was intangible—a chose in action), had a *situs* in New York; or both. All this however is immaterial. So far as concerns our present inquiry, the decision does not in any wise hold nor purport to hold that the State of New Jersey did not have the power to tax that transfer—does not have the power to tax a transfer of intangibles owned by a New Jersey resident where the act of transfer is performed in New York. The most that it holds is that the nature, effect and validity of an act of transfer performed in New [fol. 101] York is to be determined by the law of New York.

Applying that holding to the instant case simply means that the nature, effect and validity of the trust deed here being considered, is to be determined by the law of New York (where it was executed and delivered). There is

however no controversy as to the nature, effect or validity of the deed. Concededly it was a valid deed and comprised and effected a transfer of the legal title to the trustee and transfers of the equitable interests to the beneficiaries as therein specified. (No proof was in fact made as to the law of New York in this regard, and hence it is presumed that that law is the same as the law of this state.) The question here is whether those transfers made by an owner-grantor domiciled in New Jersey, are beyond the power of New Jersey to tax, simply because they were made in New York. The *Cutts* case is in nowise authority one way or the other.

(In *Hasbrouck* v. *Martin*, 120 N. J. Eq. 96, 183 Atl. Rep. 735, cited by respondent, there was no question raised by the parties nor considered by the court as to the power of this state to impose the tax. It cannot therefore be deemed authority one way or the other, as to the present dispute.)

On the other hand, in *Carr* v. *Edwards*, 84 N. J. L. 667; 87 Atl. Rep. 132, a tax was levied by New Jersey in respect of the testatmentary transfer of the estate of a non-resident testator which included stocks in New Jersey corporations, and it was held that the law of New Jersey controlled the right of succession to such property of a Massachusetts decedent as had its *situs* in this state, and that our transfer inheritance tax act intended to, and did, tax that transfer of that property. It is a determination therefore, by our [fol. 102] highest court, that the state of the *situs* of property has the right to tax the transfer of such property, notwithstanding that the act effectuating transfer, (in the *Carr* case the Massachusetts will) occurs outside of this state. In the instant case the act of transfer (the execution of the deed of trust) occurred in New York but the property thereby transferred (being intangible personal) had its *situs*, as we have seen, in the domicile of its owner—New Jersey.

A final and controlling authority on this point is the determination of the United States Supreme Court in *Curry* v. *McCanless*, *supra*. The court there said (p. 366), that the jurisdiction of a state to impose upon the owner of intangibles a tax on the use and enjoyment of rights therein, measured by their value does not depend on *any factor other* than the domicile of the owner within the taxing state; and again (p. 370) that inasmuch as the state of domicile of

the owner of intangibles may lawfully tax such intangible property in the hands of such owner, "we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state." This obviously excludes any necessity that the act of making the transfer must be performed in the taxing state. It can make no material difference in this regard whether the act of transfer be by will or by deed.

It is deemed therefore that the fact that the deed of trust in the instant case was executed and delivered in New York, constitutes no ground for holding the present tax invalid.

There is no greater force to the contention of appellants that the present tax is invalid because of the fact that the [fol. 103] deed of trust was made to a trustee which was a corporation of New York and located and doing business solely in New York, and the transferees of the equitable interest were non-residents. The statute contains no such limitation, and no authority whatever is submitted by appellants. No logical basis for such a contention can be perceived.

Neither is it at all material to the present issue, that the deed of trust provides that it shall be construed according to the law of New York. The mere fact that the deed contains that provision does not deprive New Jersey of the power and right to tax the transfers therein provided. It might be that if, construed according to the law of New York, that deed was invalid or the transfers therein provided were invalid or were of a different nature and effect than if construed according to the law of New Jersey, the right of New Jersey to tax under the provisions of our present statute might be affected; but no such situation exists. There is no claim whatever that there is any difference under the law of New York, as to the validity, nature and effect of the deed of trust or the transfers therein specified, than under the law of New Jersey.

We come now to the contentions more strongly stressed by appellants—*i. e.* (a) that at the time the deed was made the property thereby transferred to the trustee was located outside the territorial boundaries of New Jersey, and so continued at all times thereafter, and hence New Jersey had no power to tax the transfers made by that deed; (b)

that the interests given to the sons were contingent and did not vest until the grantor's death, and hence that no transfer to the sons (being the transfer on which the present tax was [fol. 104] levied and assessed) took place until the death of the grantor; (c) that at the time of grantor's death he was not the owner of the property transferred by the trust deed and hence that property was not located in New Jersey and therefor New Jersey had no power to tax that transfer thereof.

First as to the *situs* of the property comprised in the trust deed, at the time of the making of that deed. That property, as has been said, was comprised entirely of intangibles—securities—owned, both as to legal title and beneficial interest, by the grantor, but the paper evidences of which were in the custody and possession of a New York corporation (the same one named as grantee in the deed), as agent of the grantor, and which had so acted as such agent for some considerable time, keeping them in safe custody, collecting the income for grantor and from time to time making sales and purchases as directed by the grantor.

It has been said in divers cases that the legal *situs* of intangibles, for the purpose of taxation, is the state of domicile of the owner—this on the basis of a convenient fiction by which, in analogy to the principles applicable to the taxation of tangibles, a physical *situs* has been attributed to intangibles which in fact do not have, and cannot have, a physical *situs*. The actual basis for taxation in respect of intangibles is the control over the owner thereof by the state in which such owner is domiciled—and the duty of such citizen to contribute to the support of the government of his state. But, whatever the theory, it is certainly firmly established that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner "a tax on the use and enjoyment of [fol. 105] rights in intangibles, measured by their value." *Curry* v. *McCanless*, *supra*, at pages 367, 366, 370. And this includes the right to tax the *transfer* of intangible property or of an interest therein, whether such transfer is effected by an act in that state of domicile or an act in some other state. *Id.*, page 370. *Hopper* v. *Edwards*, 88 N. J. L. 471, 96 Atl. Rep. 667, cited by appellants, of course could not prevail over *Curry* v. *McCanless*, *supra*, but in fact it is in nowise authority for the proposition that the state of domicile of the owner has no power to tax such

transfer where the paper evidences are located in another state. It decides, at most, (i. e. assuming that the property involved in the transfer there under consideration was intangible property) that New Jersey, where the evidences of the intangibles were located, could validly tax the transfer of the intangibles, notwithstanding the owner-transferor of the intangibles was domiciled in New York, and notwithstanding New York may have validly levied a tax on the same transfer. In other words, it decides that, under the circumstances of the instant case, New York can validly tax, but it does not decide that New Jersey cannot validly tax.

It has been held in a number of cases (see those cited in *Curry* v. *McCanless*, *supra*, at page 368) that where an owner of intangibles who is domiciled in one state but has carried on business in another state and in so doing "established a business *situs*" in such other state of some or all of his intangibles, tax may be imposed by the state of such "business *situs*" in respect of such intangibles. Appellants contend that such was in fact the situation in the present case—that the grantor had established prior to the [fol. 106] execution of the trust deed, a "business *situs*" in New York for the intangibles conveyed by that deed, so that they were taxable by New York and were not taxable by New Jersey. This contention is unsound.

In the first place it may be doubted that the evidence in this proceeding establishes that any such "business *situs*" had been acquired by any of the intangibles conveyed by the deed of trust, as to enable New York to tax. All that the evidence shows is that the paper evidences of ownership of the intangibles had been for some time prior to the deed in the physical possession of an agent of the grantor in New York, who had kept them in safe custody for the owner, collected the income, and from time to time made certain sales and purchases as such agent.

In any event, this same situation existed in the recent case (1939) of *Pearson* v. *McGraw*, 308 U. S. 313, and it was held that the state of domicile of the owner of the intangibles had constitutional right and power to tax a transfer of the intangibles made by the owner aforesaid. Obviously, then, it must have been deemed by the court either, (1), that the intangibles had acquired no such business domicile as to enable tax to be imposed by the state where the evidences of the intangibles were located, or, (2), that the state

of domicile could tax, notwithstanding the other state also had power and right to tax.

No case is cited by appellants, nor has come to attention of this court, holding that the state of domicile does not have power and right to tax where a "business *situs*" has been acquired by intangibles such as to give the state of that *situs* the power and right to tax. On the contrary, the Supreme Court of the United States says in *Curry* v. [fol. 107] *McCanless*, *supra*, at page 370, "This court has never denied the constitutional power of the trustee's domicile" (the trustee being the owner of legal title to intangibles) "to subject them to property taxation" and "we perceive no ground for saying that the Fourteenth Amendment forbids the state" (of that trustee's domicile) "to tax the transfer of it" (the intangible property) "or an interest in it * * *." And again, at page 368—"it is undeniable that the state of domicile is not deprived by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." The factual situation in that case was that an owner domiciled in Tennessee had conveyed to an Alabama trustee legal ownership of a trust fund of intangibles (for her own benefit for life) reserving to herself the power to dispose of the trust fund by her will—which she did. The court held that both Tennessee and Alabama had power and right to tax the transfers made by that Tennessee will.

Again in *Graves* v. *Elliott*, 307 U. S. 383, a Colorado citizen transferred intangibles to a Colorado trustee by deed of trust, reserving power to revoke. The grantor later became domiciled in New York and died without revoking. Colorado levied a tax on the transfer occurring at death (as of course Colorado might lawfully do, under the authorities hereinbefore mentioned—being the state of domicile of the owner of legal title to the intangibles). It was held that New York also might lawfully levy tax on the transfer which occurred at the death of the grantor consist- [fol. 108] ing of the relinquishment of the power to revoke—that right of revocation being a potential source of wealth to her and having the attributes of property, and being an interest owned by her which she transferred or relinquished at her death, she being then domiciled in New York.

Although it is thus held by the United States Supreme Court that there is no constitutional prohibition against such "double taxation," it may be noted that in the present instance New York has not sought to impose tax on the transfers here under consideration.

It is further to be noted that the highest court of this state has held that this state may validly impose a tax upon intangibles owned by a corporation domiciled in this state, notwithstanding those intangibles have acquired a "business *situs*" in another state. *Newark Fire Ins. Co.* v. *State Board &c.*, 118 N. J. L. 525, 193 Atl. Rep. 912; aff'd 120 N. J. L. 224, 198 Atl. Rep. 837. This decision was affirmed by the United States Supreme Court, 307 U. S. 313, but that court was equally divided as to the ground of affirmance. However the decision of our highest court, not overruled by the United States Supreme Court, is of course controlling here.

The execution and delivery of the deed of trust in the instant case effected a transfer of the legal title in the intangibles, by and from the New Jersey domiciled owner-grantor to the New York domiciled trustee, and also a transfer, at the same time, of an equitable interest of contingent remainder therein, to the two sons. Under the authorities cited, New Jersey had the power and constitutional right to tax either or both of these transfers.

[fol. 109] The tax here appealed was levied and assessed on the transfers to the sons. Appellants say that these transfers, being contingent, did not occur until the happening of the contingency and that New Jersey had no right or power to tax them because at that time New Jersey was not the state of domicile of the owner of the intangibles—ownership of the legal title being then in the New York trustee.

It may be here stated that it seems clear that if the state of domicile of the owner-grantor of intangibles has the constitutional power to tax the transfer of the legal title to those intangibles, it must likewise have the power to tax the transfer of any lesser legal interest than absolute ownership, and to tax the transfer of equitable interests as well as legal interests therein. No logical basis for any differentiation in this regard can be perceived. If the transferor owns the complete and absolute, legal and equitable title in this intangible personalty (as he did in the instant case), then he owned each and every interest therein less than

the full and complete, legal and equitable title; and since the whole and complete ownership was that of intangible property, every lesser part or interest would also necessarily be intangible property, and the state of domicile of such owner-grantor can constitutionally tax the transfer of any partial legal or equitable interest in the intangibles just as well as it can tax the transfer of the complete legal and equitable title.

That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency is not true. It cannot be [fol. 110] controverted that there *was* a transfer of interest from the owner-grantor to the two sons; that it was made *by* the owner-grantor; and that the *only* act of the owner-grantor in making that transfer was the execution and delivery by him of the deed of trust. That deed was irrevocable, and after its execution and delivery there was no act by the grantor, and no failure to act by him, which in any wise, did, or could, have any operation or effect in effectuating or preventing the transfer. By the deed he made a transfer of the interest in remainder, and thereafter he had no control whatever over that interest. Thereafter that interest must necessarily vest, at his death, in one or other of the alternative contingent remainder-men—and that by operation of the deed which he had made. It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; but it is inescapable that *he* made the transfer; and that he made it *at and by* his execution and delivery of the trust deed; and that that execution and delivery was the *only* thing he did in making the transfer.

Since it must be conceded that a transfer to the sons did occur; that it was effected solely by the trust deed; that that deed was made solely by the owner-grantor; that from the moment that deed was executed and delivered, it and the transfers therein and thereby made were utterly beyond any and all power of the grantor to revoke, amend or in any wise control, it necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him at the time he executed and delivered the deed; and, since at that time he was domiciled in New Jersey, New Jersey has the right to tax that trans-

fer, notwithstanding the interest so transferred did not vest [fol. 111] in the particular beneficiary until the grantor's death.

At the time the grantor performed the only act (positive or negative) performed by him in the making of the transfer, he had the legal title to the intangibles, and he was domiciled in this state. But more than this—the transfers upon which the present tax has been levied were not transfers of the legal title; they were transfers of interests of equitable remainder, and those interests were intangible property, and hence their transfer was taxable in the state of grantor's domicile even if we should assume that the legal title to the securities was in the New York trustee. Suppose grantor had made a deed of trust conveying the legal title to the securities to the New York trustee in trust for himself, and had thereafter made a deed conveying the equitable remainder to the sons. That equitable remainder would have been intangible property owned by the grantor and would have been taxable either under a property tax or a transfer tax by the state of his domicile. This is precisely the situation, and basis for taxation, in those cases where a grantor has made a *revocable* deed of trust and died without revoking. In such case the grantor's right of revocation and re-acquiring the property constitutes property of the grantor—and obviously intangible property—a transfer of which occurs by the relinquishment or termination thereof at the death of the grantor without revocation. And where such a transfer (by relinquishment or termination) occurs at death, it is constitutionally taxable by the state in which the grantor is domiciled at death. *Kings County Trust Co.* v. *Martin*, *infra*; *Graves* v. *Elliott*, *supra*; *Curry* v. *McCanless*, *supra*.

[fol. 112] As a matter of fact the grantor continued to be domiciled in New Jersey at all times thereafter until his death—although it is deemed that this fact is not material. The grantor's domicile at the time of his death would be material if, and only if, he had reserved to himself any power of revocation or control over this equitable remainder interest (as in such cases as *Graves* v. *Elliott*, *supra*, and *Kings County Trust Co.* v. *Martin*, 121 N. J. L. 290, 2 A. 2d 187)—but this he did not do.

By the deed of trust he made an irrevocable transfer of the equitable remainder. Although the identity of the particular beneficiaries in whom it would invest was not speci-

fied and would not be known until his death, nevertheless it *must vest* in *some* of the contingent beneficiaries named in the deed (for the final, contingent, substitutionary remaindermen therein specified are the heirs at law and next of kin of the grantor). The interest must pass under and by the deed, therefore; it cannot pass under his will or by intestate succession. The transfer is therefore made by the deed.

New Jersey has the right to impose tax on that transfer, for the reasons hereinbefore stated; and New Jersey *has* imposed such tax, by the terms of our statute. It will be noted that the statute imposes the tax on the transfer of *any interest* in property, whether the property is situate within or without this state—where the transfer is made by a resident of New Jersey (and is by will, intestate succession or by *inter vivos* conveyance made in contemplation of death or intended to take effect at or after death). See the statute, § 1, first paragraph, and § 26. Also, in the case of an *inter vivos* (or testamentary) transfer comprising an estate or interest contingent or defeasible in character, the [fol.113] property in which such interest is created is to be appraised immediately upon the occurrence of the making of the instrument of transfer, although, the tax on the transfer of the contingent or defeasible interest is not to be levied and assessed until the happening of the contingency. See § 3. The tax is on the transfer at the time it is made, though it may be not payable, or even assessable until a later time. *Cf. Renwick* v. *Martin*, 126 N. J. Eq. 564, at pp. 578-9, 10 A. 2d 293; *Citu Bank Farmers Trust Co.* v. *Martin*, 127 N. J. Eq. 492, 13 A 2d 852; and *Wimpfheimer* v. *Martin*, 127 N. J. Eq. 587, 14 A. 2d 59.

Appellants rely upon the decision in *Carter* v. *Bugbee*, 92 N. J. L. 390, 106 Atl. Rep. 412, as establishing their contention that in the case of a conveyance of a contingent interest which does not vest until the death of the grantor, no transfer occurs until the happening of that contingency and the consequent vesting. That case dealt with the validity of a tax levied under our statute on a transfer of equitable interests in contingent remainder, made by a non-resident of this state in and by an irrevocable deed of trust, comprising shares of stock of New Jersey corporations. It is true that in that opinion it was said, (p. 393) that "there could be no transfer" of the title to the estate in contingent

remainder until the occurrence of the contingency—but the court was not there concerned with, nor considering, whether or not any taxable transfer, or taxable step in a transfer, occurred at and by the execution and delivery of the trust deed, and in all probability did not intend to say or to be understood as saying that no taxable transfer or step in a transfer occurred at and by the making of such [fol. 114] deed. Furthermore, even if the court did intend its statement to be taken literally and completely, such a broad statement was not necessary to the actual determination as to taxability there made. It was not necessary to go any further than to hold that the transfer did not become complete until the happening of the contingency and that that completion, or that transfer as and when so completed, constituted a transfer at the time of such completion which was taxable and intended to be taxed by the provisions of our statute relating to transfers by non-residents. Consequently so much of the statement in the *Carter* case as was not necessary to the decision there made, and as is contrary to the generally accepted principles of law, is to be regarded as dictum and not as controlling in the determination of the present case. *Catts* v. *Najdrowski*, 123 N. J. Eq. 481, at page 482, 198 Atl. Rep. 885.

Although the case of *MacClurkan* v. *Bugbee*, 106 N. J. L. 192, 150 Atl. Rep. 443, is not specific authority as holding that where transfers are made by deed of trust such as in the instant case, a transfer of the contingent equitable remainder occurs at the time of the execution of that deed, which is subject to the operation of our statute, it would seem that there can be little if any doubt, from what was said by the court in that case, that such would have been so held, if that had been the question then before the court.

The facts and conclusions in the *MacClurkan* case have hereinbefore been set forth in connection with another point in the argument, but it may be added here, in connection with the present point, that the decision holds that where an irrevocable trust deed is made conveying intangibles to a contingent beneficiary, the transfer (from the standpoint of [fol. 115] our tax statutes) is made at and by the execution of the trust deed and that if the grantor be not at that time a resident of New Jersey, there is no transfer made taxable under the terms of our statute, notwithstanding that at the time of the happening of the contingency which vests the

contingent remainder, such grantor has become and is domiciled in this state. It will be observed therefore that it is essentially in contradiction to the earlier case of *Carter* v. *Bugbee*, if that case is to be understood as holding that *no* transfer occurs until the happening of the contingency, where a contingent remainder is given by irrevocable deed of trust.

If the provisions of the deed of trust herein involved failed to specify a beneficiary for each and every possible contingency, so that there was a possibility that the gift of remainder might fail (because of failure to vest in *any* of the specified contingent beneficiaries), it might be argued that no transfer of that remainder occurred until the happening of the contingency; that until that time the vested ownership of that remainder continued to reside in the grantor and would never pass from him by operation of the deed unless at that time some one of the specified contingent beneficiaries was alive to take; that if at that time no such beneficiary were alive to take, the remainder would not pass at all by the deed but would pass by the grantor's will or by intestate succession. Perhaps, indeed, it might be argued that even under the actual provisions of the present deed, the ownership of the remainder remained vested in the grantor until the happening of the contingency, because there was no provision in that deed for any prior vesting—not even a defeasible vesting; that therefore no transfer—[fol. 116] because no completion of the transfer—occurred until the actual vesting at the death of the grantor.

But even if such a view be accepted, it still remains true that the equitable remainder interest was intangible property; and if it be deemed that the grantor was still the owner thereof until the happening of the contingency and did not transfer it until that time, nevertheless at that time he was still domiciled in New Jersey, and this state has the power and constitutional right to tax that transfer because, as hereinbefore shown, it has such right and power to tax the transfer of intangible property, by the owner thereof, if such owner be then domiciled in New Jersey. The fact that at the time of that transfer of the intangible interest of equitable remainder in the intangible securities, the legal title to the latter was in the New York trustee, does not prevent the taxability by New Jersey of the transfer, by the New Jersey citizen, of that intangible equitable remainder

interest still owned by him. *Curry* v. *McCanless, supra; Graves* v. *Elliott, supra.*

It is concluded therefore that the tax in question must be affirmed, both as to that portion based on the annuity refund transfers and as to the portion based on the transfers by trust deed.

[fol. 117] NEW JERSEY PREROGATIVE COURT

No. 5452

Between CENTRAL HANOVER BANK AND TRUST COMPANY, Executor &c., et al., Appellants,

and

J. H. THAYER MARTIN, State Tax Commissioner, Respondent

In the Matter of The Transfer Inheritance Taxes in the Estate of George W. E. Atkins, Deceased.

FINAL DECREE—Filed March 27, 1941

This matter coming on to be heard in the presence of Child, Riker, Marsh & Shipman, Theodore McC. Marsh, of counsel, proctors for appellants, Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, and David T. Wilentz, Attorney General, and William A. Moore, [fol. 118] Assistant Attorney General, proctors for respondent, J. H. Thayer Martin, State Tax Commissioner, and the Court having examined the pleadings and transcript of record herein and having heard and considered the argument of proctors for appellants and respondent;

And It Appearing To The Court that George W. E. Atkins, the decedent, between July, 1932 and October, 1935, did purchase six refund annuity agreements or policies, five of the Equitable Life Assurance Society of New York and one of the New York Life Insurance Company, all essentially alike, whereunder each company, in consideration of a lump sum called the "single premium" or "capital investment" paid to the company by the decedent, bound itself to pay to the decedent certain fixed, equal, monthly installments during his life, and if he should die before receiving monthly

payments aggregating the amount of the "single premium" or "capital investment", to continue payment of the monthly installments after his death to his two sons, George Chew Atkins and John Norton Atkins, designated by decedent as his successor beneficiaries, until the total of said installments repaid equalled the amount paid in; that the right was reserved to the decedent under said agreements or policies to change said beneficiaries during his life; and that the State Tax Commissioner did assess a tax on the transfers to the two sons aforesaid of the installments coming due after the death of the decedent under these policies, as having been intended by decedent to take effect in possession or enjoyment at or after his death;

And The Court Having Concluded that the transfers to the two sons of the unpaid installments under the policies aforesaid were made by decedent in contemplation of his [fol. 119] death and intended by him to take effect in possession or enjoyment at or after his death; that said transfers are not saved from taxability because made through the medium of a third party; that the unpaid installments coming due at and after decedent's death and payable to his two sons are not proceeds of life insurance policies; that said refund annuity policies are not contracts of insurance insuring the life of decedent; that said refund annuity policies not being contracts of insurance and the unpaid installments thereunder not being proceeds of life insurance policies are not, therefore, affected by chapter 228, laws of 1909, as amended by chapter 144, laws of 1929, section 1, subsection "Fifth", paragraphs (b) and (c) (now R. S. 54:34-4b and c), in force when the policies were written and when the decedent died, nor by R. S. 54:34-4f and g passed in 1939; and that the assessment of inheritance tax by the State Tax Commissioner on these transfers should for these reasons be affirmed;

And It Further Appearing To The Court that the decedent, on May 16, 1929, did execute and deliver in the State of New York an irrevocable deed of trust of intangible personal property, the legal title to which and the beneficial ownership of which, was in the decedent, the grantor, then and for a considerable time prior thereto a domiciled resident of the State of New Jersey; that the securities or the paper evidence of ownership of said intangible personal property was, at that time and for sometime previously, and at all times subsequently, until the death of decedent,

physically located in the State of New York; that prior to the making of the deed of trust said securities or paper evidence of ownership had been in the custody of an agent of [fol. 120] said decedent in the State of New York; that the trustee under said deed of trust was a corporation of and having its office in the State of New York; that the trust deed provided by its express terms that it is to be construed according to the laws of the State of New York; that the decedent continued to be domiciled and resident in the State of New Jersey at all times subsequent to the execution and delivery of the trust deed until and at the time of his death; that the trust deed provided, in essence, for an equitable life estate to the grantor, for life, and thereafter to his wife, for life, if she survived him, and that the corpus in remainder be paid to the grantor's two sons, if living, with substitutionary gift over in case of their prior death; that the wife predeceased the grantor and the two sons survived him; that the State Tax Commissioner did levy and assess a tax on the transfers of the equitable interests in remainder under the deed of trust to the two sons on the premise that said transfers were intended to take effect in possession or enjoyment at or after the decedent's death and that the subject matter of the transfers, i. e., the intangible personal property comprising the corpus of the trust, was within the jurisdiction of the State of New Jersey at the time of the creation of the trust for the purpose of levying an inheritance tax on the transfer thereof;

And The Court Having Concluded that the tax herein complained of has been assessed on the transfer of certain interests in the property subject to the deed of trust and not on the property itself; that even if it were otherwise the result would not be different, since the property was intangible personal property and the power to tax such property inheres in the state of the domicile of the owner thereof; [fol. 121] that a transfer under the circumstances *sub judice* comes clearly within the scope of the express terms of subsection "First", section 1, chapter 228, laws of 1909, as amended to the date of the transferor's death; that the transfers of the contingent equitable interests in remainder in the trust estate to the two sons of the grantor were by deed made in contemplation of the grantor's death and also were intended to take effect in possession or enjoyment at or after his death; that the power of the state to impose a tax upon property, or upon the owner of property, rests

upon the dominion and control of that state over that property, or over the owner; that the fact that the act effectuating the transfer was performed in New York by the execution and delivery there of the trust deed and that the trust deed was made to a trustee which was a corporation of New York and located and doing business solely in the State of New York, and the transferees of the equitable interests were non-residents of the State of New Jersey, does not affect the validity of the tax; that the legal *situs* of the intangibles for purposes of taxation is the state of domicile of the owner; that the actual basis for taxation of intangibles is the control over the owner thereof by the state in which such owner is domiciled; that the state of domicile of the owner of intangibles has the power and the constitutional right to impose on such owner a tax on the use and enjoyment of rights in intangibles, measured by their value, including the right to tax the transfer of such intangibles, or any interest therein, whether such transfer is effected by an act in the state of domicile or an act in some other state, and even though such property may have acquired a busi- [fol. 122] ness *situs* in a state other than the state of domicile; that the transfers by the deed of trust to the sons of the grantor were contingent and said transfers did not become complete until the happening of the contingency; that the taxable event was the execution and delivery of the deed of trust; that since the grantor was then legally domiciled in the State of New Jersey and the subject matter of the transfers to the contingent beneficiaries was intangible personal property, the State of New Jersey then had the power and the constitutional right to impose an inheritance tax on such transfers, regardless of the fact that the estates in remainder were contingent and did not vest in the beneficiaries thereof until the death of the grantor; and that the assessment of inheritance tax on the transfers under the deed of trust aforesaid should for these reasons be affirmed;

It Is, on this twenty-seventh day of March, 1941 Ordered, Adjudged and Decreed that the assessment of transfer inheritance taxes on February 11, 1938 by the State Tax Commissioner, in the matter of the estate of George W. E. Atkins, deceased, late of Essex County, New Jersey, insofar as said assessment includes a tax on the transfers of the installments coming due at and after the death of the de-

cedent and payable to George Chew Atkins and John Norton Atkins, sons of the decedent, under the six refund annuity agreements or policies of the Equitable Life Assurance Society of New York and the New York Life Insurance Company, and insofar as said assessment includes a tax on the transfers to said two sons of the grantor of the equitable interests in remainder under the deed of trust executed by the decedent on May 16, 1929, be and the same is hereby af- [fol. 123] firmed, with costs to be paid by appellants to respondent.

Respectfully advised, Malcolm G. Buchanan, V.-O.
Luther A. Campbell, Ordinary.

The foregoing decree is approved as to form.

Child, Riker, Marsh and Shipman, Proctors for Appellants.

[File endorsement omitted.]

[fol. 124] New Jersey Supreme Court

Central Hanover Bank and Trust Company, etc., George Chew Atkins and John Norton Atkins, as Executors under the last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors,

vs.

J. H. Thayer Martin, State Tax Commissioner, Luther A. Campbell, Ordinary and Thomas A. Mathis, Register of the Prerogative Court, Respondents

Reasons for Reversal—Filed June 20, 1941

The Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors, hereby set forth the following as the reasons upon

which they will rely for the reversal of the decree of the Prerogative Court in the above entitled cause:

[fol. 125] 1. Because the decree of the Prerogative Court affirmed the assessment made by State Tax Commissioner of the State of New Jersey against the Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the last Will and Testament of George W. E. Atkins, and George Chew Atkins and John Norton Atkins, individually, whereas it should have reversed the same on the grounds set forth in the petition of appeal filed in said cause:

2. Because the decree of the Prerogative Court affirmed the assessment levied against the Estate of George W. E. Atkins, deceased, by the State Tax Commissioner of the State of New Jersey, wherein he fixed and determined the net value of said Estate to be the sum of $601,466.18, whereas the same is erroneous in that the said Tax Commissioner included as a part of the taxable assets thereof the sum of $28,683.30 being the amount payable to George Chew Atkins and John Norton Atkins under and in accordance with certain annuity policies of the Equitable Life Assurance Company of the United States and the New York Life Insurance Company, as follows:

Company	Beneficiary	Amount
Equitable Life—#9,142,731	George Chew Atkins and John Norton Atkins	$1,787 73
Equitable Life—#9,260,836	George Chew Atkins and John Norton Atkins	3 322 77
Equitable Life—#9,545,296	George Chew Atkins and John Norton Atkins	4 786 42
Equitable Life—#8,877,293	John Norton Atkins	3 808 87
Equitable Life—#8,948,433	George Chew Atkins	4 138 67
New York Life—#303,553	George Chew Atkins and John Norton Atkins	7 838 84

[fol. 126] When the moneys paid under and in accordance with the said policies were not the property of the decedent or of his said Estate and the transfer thereof was not a taxable transfer within the provisions of the Statute in such case made and provided, for the following reasons:

(a) The moneys are the proceeds of contracts of insurance and the payment of the same by the said companies to the beneficiaries therein named was not a transfer of

property by deed, grant, bargain, sale or gift made in contemplation of the death of George W. E. Atkins.

(b) The moneys are the proceeds of contracts of insurance and the payment of the same by the said companies to the beneficiaries therein named was not a transfer of property by deed, grant, bargain, sale or gift to take effect in possession or enjoyment at the death of George W. E. Atkins.

(c) The moneys were the proceeds of contracts of life insurance and as such exempt from taxation under the provision of the Statute in such case made and provided.

3. Because the decree of the Prerogative Court affirmed assessment levied against George Chew Atkins by the State Tax Commissioner of the State of New Jersey wherein he determined and fixed the sum of $298,991.86 as the amount of the property transferred to him and fixed the tax thereon at the sum of $9,809.59, whereas the same is erroneous in that the said Tax Commissioner included as a part thereof the sum of $10,367.88 representing the commuted value of [fol. 127] the annuity contracts of the Equitable Life Assurance Company on policies No. 9,142,731—9,260,836 and 9,545,296 and of the New York Life Insurance Company No. 303,553, and the sum of $4,138.67 representing the commuted value of the annuity contract of the Equitable Life Assurance Company No. 8,948,433 when the moneys paid under and in accordance with said contracts were not taxable and the transfer thereof was not a taxable transfer for the reasons more particularly set forth in paragraph two hereof.

4. Because the decree of the Prerogative Court affirmed the assessment levied against John Norton Atkins by the State Tax Commissioner of the State of New Jersey wherein he determined and fixed the sum of $302,474.32 as the amount of the property transferred to him and fixed the tax thereon at the sum of $10,098.46, whereas the same is erroneous in that the said Tax Commissioner included as a part thereof the sum of $10,367.88 representing the commuted value of the annuity contracts of the Equitable Life Assurance Company on policies No. 9,142,731—9,260,836 and 9,545,296 and of the New York Life Insurance Company No. 303,553, and the sum of $3,808.87 representing the com-

muted value of the annuity contract of the Equitable Life Assurance Company No. 8,877,293 when the moneys paid under and in accordance with said contracts were not taxable and the transfer thereof was not a taxable transfer for the reasons more particularly set forth in paragraph two hereof.

5. Because the decree of the Prerogative Court affirmed the assessment made by the State Tax Commissioner of the State of New Jersey, wherein he fixed and determined the [fol. 128] net value of the Estate of George W. E. Atkins to be the sum of $601,466.18 whereas the same is erroneous in that the State Tax Commissioner included as a part of the taxable property of said estate the sum of $376,917.04 being the appraised value of the securities comprising a certain trust fund created by and in accordance with an agreement of trust made on the 16th day of May, 1929, by and between George W. E. Atkins and the Central Hanover Bank and Trust Company of the City of New York whereas the bonds, stocks, mortgages and cash comprising said trust fund, were not taxable property and the transfer thereof was not a taxable transfer for the following reasons:

(a) The State of New Jersey had no jurisdiction to tax the transfer of the said property as the same did not have a taxable situs within the State of New Jersey at the time of the execution of the trust agreement when the alleged taxable transfer occurred.

(b) The State of New Jersey had no jurisdiction to tax the transfer of the said property as the same did not have a taxable situs within the State of New Jersey at the time of the death of George W. E. Atkins when the alleged taxable transfer occurred.

(c) The transfer alleged to be subject to the tax occurred without the territorial boundary of the State of New Jersey and was therefore not taxable by the State of New Jersey.

(d) The State of New Jersey had no jurisdiction to tax the transfer of said property as the owner thereof was not a resident of, nor domiciled within, nor the property located [fol. 129] within, the State of New Jersey at the time when the transfer alleged to be taxable occurred.

(e) The alleged taxable transfer occurred at the date of the death of George W. E. Atkins when the contingent re-

mainders to George Chew Atkins and John Norton Atkins first vested and the State of New Jersey had no jurisdiction to tax such transfer as at that time it had no power or control over either the owner of said property or the property itself as the owner was resident and domiciled, and all the property located, outside of the jurisdiction of the State of New Jersey.

(f) The property comprising the said trust fund was located without the territorial boundaries of the State of New Jersey at the time of the execution of the said agreement of trust on May 16th, 1939; the said agreement was executed by the parties thereto outside of the State of New Jersey, the legal title of said property transferred thereby to the Central Hanover Bank and Trust Company, a resident of the State of New York and domiciled therein, and that the legal title and possession of all of the said property has always remained in said Central Hanover Bank and Trust Company and the trust fund entirely administered by the Central Hanover Bank and Trust Company without the State of New Jersey since the execution of the said agreement and during the entire lifetime and at the death of the said George W. E. Atkins, and the transfer thereof is not a taxable transfer within the provisions of the statute of New Jersey in such case made and provided.

[fol. 130] (g) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law as a state has no power or jurisdiction to tax property located outside of its own boundaries; and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(h) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States prohibiting the denial to any person

within its jurisdiction of the equal protection of the laws, as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(i) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of the said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Fifth Amendment of the Consti- [fol. 131] tution of the United States prohibiting the taking of private property for public use without just compensation as a state has no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

(j) If it be determined that the provisions of the statute of New Jersey provide for the taxation of the transfer of said property belonging to the said trust fund while without the State of New Jersey, then the provisions of said statute taxing such a transfer are unconstitutional and void as a violation of the Sixteenth Section of the First Article of the Constitution of the State of New Jersey prohibiting the taxing of private property for public use without just compensation as the State of New Jersey had no power or jurisdiction to tax property located outside of its own boundaries, and the assessment and tax levied by the State Tax Commissioner are illegal and void.

6. Because the decree of the Prerogative Court affirmed the assessment levied against George Chew Atkins by the State Tax Commissioner of the State of New Jersey wherein he determined and fixed the sum of $298,991.86 as the amount of the property transferred to him and fixed the tax thereon at the sum of $9,899.59 whereas the same is erroneous in that the Tax Commissioner included as a part thereof the sum of $188,458.52 representing one-half of the value of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, when the bond, mortgages, stocks and cash, [fol. 132] comprising the said trust fund, were not taxable property and the transfer thereof to George Chew Atkins was not a taxable transfer for the reasons set forth in paragraph 5 hereof.

7. Because the decree of the Prerogative Court affirmed the assessment levied against John Norton Atkins by the State Tax Commissioner of the State of New Jersey, wherein he determined and fixed the sum of $302,474.32 as the amount of the property transferred to him and fixed the tax thereon at the sum of $10,098.46, whereas the same is erroneous in that the Tax Commissioner included as a part thereof the sum of $188,458.52 representing one-half of the value of the corpus of the trust fund under the agreement of trust dated May 16th, 1929, when the bond, mortgages, stocks and cash, comprising the said trust fund, were not taxable property and the transfer thereof to John Norton Atkins was not a taxable transfer for the reasons set forth in paragraph 5 hereof.

Child, Riker, Marsh & Shipman, Attorneys of Prosecutors. Theo. McC. Marsh, Of Counsel.

[fol. 133] New Jersey Supreme Court

Opinion—Filed January 5, 1942

For prosecutors, Child, Riker, Marsh & Shipman, Theo. McC. Marsh.

For respondents, David T. Wilentz, William A. Moore.

[fol. 134] Before Justices Bodine, Perskie and Porter.

Per Curiam:

The facts in this case have been carefully examined, as well as the argument of counsel. The opinion of the learned Vice Chancellor reported in 129 N. J. E. 186, is a complete refutation of every argument made.

The tax, as assessed, will be affirmed.

[fol. 135] NEW JERSEY SUPREME COURT

CENTRAL HANOVER BANK AND TRUST COMPANY, etc., GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors under the last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent

In the Matter of The Transfer Inheritance Tax Assessment in the Estate of George W. E. Atkins, Deceased

RULE FOR JUDGMENT—Entered January 14, 1942

This cause coming on to be heard at the October Term, 1941, of this Court; and the Court having inspected the return to the writ of *certiorari* issued therein, and having considered the reasons assigned for the reversal of the decree of the Prerogative Court entered in this matter, affirming the transfer inheritance taxes assessed in the matter of the estate of George W. E. Atkins, deceased, and the Court being of the opinion that said decree should be affirmed and [fol. 136] the writ dismissed;

It is on this 14th day of January, 1942, Ordered that the decree of the Prerogative Court, entered March 27, 1941, affirming the assessment of transfer inheritance taxes in the matter of the estate of George W. E. Atkins, deceased, be and the same is hereby affirmed and the writ of *certiorari* allowed herein dismissed.

J. Lr. Bodine, J. S. C.

Entered: January 14, 1942.

Actually entered January 15, 1942.

On Motion of: David T. Wilentz, Attorney General of New Jersey, Attorney for Defendant.

[fol. 137] NEW JERSEY SUPREME COURT

[Title omitted]

ORDER ALLOWING COSTS—Entered Jan. 14, 1942

An opinion of this Court, decided January 5, 1942, in the above cause, affirming a certain decree of the Prerogative Court, filed March 27, 1941, in favor of defendant-respondent, having failed to provide for the payment of costs in this Court to the defendant-respondent, and application now being made for the payment of such costs to defendant-respondent;

[fol. 138] It is, on this 14th day of January, one thousand nine hundred and forty-two, ordered that costs be allowed to the defendant-respondent, and the Clerk of this Court is hereby directed to tax such costs for and on behalf of defendant-respondent.

J. L. Bodine, J. S. C.

Entered: January 14th, 1942.

Actually entered January 15, 1942.

On Motion of: David T. Wilentz, Attorney General of New Jersey, Attorney for Defendant-Respondent.

[fol. 139] NEW JERSEY SUPREME COURT

[Title omitted]

NOTICE OF APPEAL—February 11, 1942

To David T. Wilentz, Esquire, Attorney of the Defendant-Respondent:

Take notice that, Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the Last Will and Testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, prosecutors-appellants, appeal from the whole of the judgment entered in the above entitled cause in the New Jersey Supreme Court on the 14th day of January, 1942, affirming the decree of the Prerogative Court entered March 27th, 1941 affirming the assessment of transfer inheritance taxes in the matter of the Estate of George W. E. [fol. 140] Atkins, deceased, and also from the order of the Supreme Court dated January 14th, 1942 allowing costs on

the appeal to the respondent, to the New Jersey Court of Errors and Appeals.

Child, Riker, Marsh & Shipman, Attorneys for Prosecutors-Appellants.

Theodore McC. Marsh, Of Counsel.

Dated: February 11th, 1942.

Service of the within notice is hereby acknowledged this — day of February, 1942.

David T. Wilentz, Attorney General, Attorney of Defendant-Respondent.

[fol. 141] New Jersey Court of Errors and Appeals

[Title omitted]

Grounds of Appeal—February 26, 1942

To David T. Wilentz, Attorney General, Attorney of Defendant-Respondent:

The prosecutors-appellants, Central Hanover Bank and Trust Company, a corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the Last Will and Testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, assign the following as their grounds of appeal in the above entitled cause:

1. That the Supreme Court erred in affirming the decree of the Prerogative Court dated March 27th, 1941 for the reasons assigned in the Supreme Court.

[fol. 142] 2. The rule of the Supreme Court, dated the 14th day of January, 1942, which imposed upon the prosecutors-appellants the taxed costs of the appeal to the Supreme Court is erroneous in that the judgment of the Prerogative Court should have been reversed and the taxed costs imposed upon the defendant.

Child, Riker, Marsh & Shipman, Attorneys of Prosecutors-Appellants.

Theodore McC. Marsh, Of Counsel.

Dated: February 26th, 1942.

Service of the within Grounds of Appeal is hereby acknowledged this 27 day of February, 1942.

David T. Wilentz, Attorney General, Attorney of Defendant-Respondent.

[fol. 143] NEW JERSEY COURT OF ERRORS AND APPEALS

No. 19, May Term, 1942

CENTRAL HANOVER BANK AND TRUST COMPANY, ETC., GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors Under the Last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutor-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent

OPINION—Sept. 18, 1942

Argued May 20, 1942; decided September 18, 1942.

On appeal from a judgment of the Supreme Court.

For the appellants: Riker, Marsh & Shipman; Theo. McC. Marsh, of counsel.

For the respondent: David T. Wilentz, Attorney General, and William A. Moore, Assistant Attorney General.

The opinion of the court was delivered by HEHER, J.:

We concur in the view of the Supreme Court that the decree of the Prerogative Court should be affirmed, generally for the reasons expressed in the opinion delivered by the late Vice Ordinary Buchanan.

We deem it prudent to observe that the test of a gift in contemplation of death in the statutory sense is whether the determinative motive is "of the sort which leads to testamentary disposition." It is requisite that the "thought of death" be the impelling cause of the transfer. If that be a controlling motive inducing the disposition of the property, the transfer is taxable under the statute. The legislative design was to place testamentary gifts and substitutes therefor in the same succession tax category, and thus to secure equality of taxation and prevent evasion of taxes. The inquiry therefore is whether the gift was essentially testamentary in character. Was it made as a substi-[fol. 144] tute for a testamentary disposition? Was the generating thought of death as distinguished from purposes associated with life? If so, contemplation of death in the

statutory sense was the motivation for the transfer of the property. *Perry v. Martin*, 125 N. J. L. 46.

The evidence reveals that the refund annuity transfers are testamentary in nature, and therefore taxable. And we are in accord with the Vice Ordinary's view that they also fall into the category of gifts intended to take effect in possession and enjoyment at or after the donor's death, and are taxable on that ground.

Judgment affirmed.

Endorsed: "Filed Sep. 18, 1942, J. A Brophy, Clerk."

[fol. 145] NEW JERSEY COURT OF ERRORS AND APPEALS

No. 19, May Term 1942

CENTRAL HANOVER BANK AND TRUST COMPANY, ETC., GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors Under the Last Will and Testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, Prosecutors-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner, Defendant-Respondent.

In the Matter of the Transfer Inheritance Tax Assessment in the Estate of George W. E. Atkins, Deceased.

ORDER ON AFFIRMANCE OF JUDGMENT—Sept. 18, 1942—Filed Oct. 24 1942

This cause having been duly argued at the May Term, 1942 of this court by Riker, Marsh and Shipman, of counsel for the appellant and David T. Wilentz, Attorney General of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court,

It is thereupon, on this 18th day of September, 1942, ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court

to be proceeded with in accordance with this judgment and the practice of said court.

On motion of David T. Wilentz, Attorney-General, Attorney for Defendant-Respondent.
By William A. Moore, Special Counsel.

[fol. 146] NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

ORDER FOR SUBSTITUTION—Dec. 4, 1942

It appearing that the term of office of J. H. Thayer Martin as State Tax Commissioner of the State of New Jersey has expired and that William D. Kelly has been duly appointed his successor and is now acting as State Tax Commissioner of New Jersey and counsel for the respondent consenting,

It is hereby Ordered that William D. Kelly, State Tax Commissioner, be substituted for J. H. Thayer Martin as State Tax Commissioner as party respondent in the above entitled cause.

Riker, Marsh & Shipman, Attorneys of Petitioners-Appellants.

Dated: December 4th, 1942.

Notice of application for and entry of the above order is hereby waived.

David T. Wilentz, Attorney General of New Jersey, Attorney of Respondent.

[fol. 147] SUPREME COURT OF THE UNITED STATES

CENTRAL HANOVER BANK AND TRUST COMPANY, a Banking Corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors Under the Last Will and Testament of George W. E. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, Individually, Petitioners-Appellants,

vs.

J. H. THAYER MARTIN, State Tax Commissioner (William D. Kelly, Successor), Respondent

PETITION FOR APPEAL—Filed Dec. 17, 1942

To the Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States:

Your petitioners, Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, respectfully show;

1. On December 2, 1942, there was duly presented to the Honorable Luther A. Campbell, Chancellor of the State of New Jersey and Presiding Judge of the Court of Errors and Appeals of the State of New Jersey, a petition for appeal in the above entitled cause, together with assignment of errors, prayer for reversal, statement of jurisdiction and order for appeal.

2. On December 2, 1942, Honorable Luther A. Campbell, Chancellor and Presiding Judge as aforesaid, denied your petitioners said petition for allowance of appeal, solely on the ground of lack of jurisdiction. His said denial of said appeal is endorsed upon the back of said petition of appeal which is presented herewith.

[fol. 148] 3. That George W. E. Atkins died on the 9th day of November, 1936, a resident of the State of New Jersey, leaving a last will and testament, which was duly admitted to probate by the Surrogate of Essex County, State of New Jersey. In and by said last will and testament he appointed your petitioners as the executors and they have duly qualified and taken upon themselves the burden of the

administration of said estate, and are now acting as such executors.

4. On May 16, 1929, in the City and State of New York, said George W. E. Atkins irrevocably assigned, transferred and delivered to the Central Hanover Bank and Trust Company, a banking corporation organized under the laws of the State of New York and doing business in the City and State of New York, certain stock, securities and other property then in the possession of said banking corporation, to be held by the said banking corporation in trust for the purposes set forth in a certain agreement dated and executed on the same day by and between said George W. E. Atkins and said Central Hanover Bank and Trust Company. Said agreement provided that the said trustee should pay the net income to said George W. E. Atkins, grantor, during his life, and thereafter to his wife, Mary M. C. Atkins, for her life in case she survived the grantor, and further provided that in case the grantor's wife should not survive the grantor and in case his son, George Chew Atkins, should survive the grantor, that then upon the death of the grantor said trustee should divide the trust estate and transfer, assign and pay over to said George Chew Atkins one-half of the principal of the trust estate, and similarly provided that in case the grantor's said wife should not survive the grantor and his son, John Norton Atkins, should survive the grantor, that then upon the death of the grantor the said trustee should transfer, assign and pay over to the said [fol. 149] John Norton Atkins the remaining one-half of the principal of the trust fund. Further provisions were contained in said agreement for the disposition of the trust estate in the event that either or both of the said sons should not survive the grantor. Mary M. C. Atkins predeceased the grantor and both of the sons survived. At all times after the transfer and delivery of said property to the trustee and the execution of said agreement, the securities constituting the trust fund were located and the trust was administered in the City of New York and State of New York, and the domicile of the Central Hanover Bank and Trust Company, the owner of the securities, was in said City of New York, and the said George Chew Atkins and John Norton Atkins, sons of the grantor, were non-residents of New Jersey.

5. Respondent, J. H. Thayer Martin, as State Tax Commissioner of the State of New Jersey, purporting to act in

pursuance of the provisions of Chapter 228 Laws of 1909, as amended by Chapter 303 Laws of 1931 and Chapter 90 Laws of 1935, assessed and fixed the net cash value of the estate of George W. E. Atkins at the sum of $601,466.18, and levied the taxes upon the transfers to the individual appellants, George Chew Atkins and John Norton Atkins, as follows:

George Chew Atkins	$ 9,899.59
John Norton Atkins	10,098.46.

6. In assessing and fixing the said value of the estate and in levying such taxes the State Tax Commissioner included in the net cash value of the estate the sum of $376,917.04, being the appraised value of the securities constituting the corpus of the said trust fund held by said Central Hanover Bank and Trust Company under said agreement of May 16, 1929, and the said State Tax Commissioner included in the taxes levied against the individual appellants a tax on the transfer of one-half of the said trust fund to each of said [fol. 150] appellants, such taxes on the transfers of the trust fund being as follows:

George Chew Atkins	$8,133.59
John Norton Atkins	8,227.99.

7. Pursuant to the provisions of Chapter 228 P. L. 1909, and the several supplements and amendments thereto as now set forth in Revised Statutes of New Jersey of 1937, Title 54, Chapter 34, petitioners appealed from the said assessments and the levying of said taxes to the Prerogative Court of the State of New Jersey, which said court affirmed the same. Petitioners contended in said appeal that the State of New Jersey had no legal right or jurisdiction to assess the said property constituting the trust fund or to levy a tax upon its transfer because the said property did not have a taxable situs within the State of New Jersey, and because said property was located without the territorial boundaries of said state at the time of its transfer to said Central Hanover Bank and Trust Company, and thereafter so remained, and the legal title thereto and possession thereof were at all times thereafter held without the State of New Jersey by said corporation, a resident of and domiciled within the State of New York, and that if it should be determined that the said statutes respecting the assessment of estates and taxation of transfers, hereinbefore referred to, provided for, required or permitted the taxa-

tion of the transfers aforesaid, the effect would be to render Section 4 of Chapter 228 of the Pamphlet Laws of New Jersey 1909, as amended by Section 1 of Chapter 90 of the Pamphlet Laws of New Jersey 1935, and Section 18 of said Chapter 228 as amended by Chapter 303 of said Laws of New Jersey 1931, unconstitutional and void as a violation of the Fourteenth Amendment of the United States Constitution, in that it would deprive petitioners of their property without due process of law and would also deprive them of the equal protection of the laws. The Prerogative Court overruled petitioners' contention, and entered a decree affirming the action of the State Tax Commissioner in fixing the value of the estate and levying the taxes aforesaid, and dismissing the appeal.

[fol. 151] 8. Petitioners thereupon prosecuted a writ of certiorari in the New Jersey Supreme Court to review the said decree of the Prerogative Court, and in such proceedings the same constitutional question was raised before said New Jersey Supreme Court, to wit, that the situs of the property constituting the trust fund assessed was, and the transfer thereof occurred, outside of the State of New Jersey, and therefore the State of New Jersey has no jurisdiction to assess the property and to tax the transfer thereof. The New Jersey Supreme Court affirmed the decree of the Prerogative Court for the reasons expressed in the opinion of such Prerogative Court.

9. Petitioners thereupon appealed from the judgment of the New Jersey Supreme Court to the Court of Errors and Appeals, and the same constitutional question as above stated was raised, and said Court affirmed the judgment of the New Jersey Supreme Court with respect to such question upon the opinion of the Prerogative Court and for the reasons expressed therein. The said Court of Errors and Appeals is the highest court of the State of New Jersey, and the said judgment of said court is a final judgment.

10. In this cause there is drawn in question the validity of the statutes of New Jersey, Chapter 228 of the Laws of 1909, Section 1, as amended by Chapter 90 of the Laws of 1935, and Section 18, as amended by Chapter 303 of the Laws of 1931, on the ground that said statutes, as construed applied and administered by the courts of New Jersey, having authorized the assessment of said trust fund, being

property outside of the State of New Jersey, and the levy of a tax upon the transfer thereof outside of said state, are repugnant to the Fourteenth Amendment of the Constitution of the United States; and the final decision and judgment of the highest court of said State is in favor of the validity of said statutes.

[fol. 152] 11. The Court of Errors and Appeals by its decision and judgment did uphold the right of the State of New Jersey and of J. H. Thayer Martin, as State Tax Commissioner, acting under the statutes above mentioned, to assess the property of the petitioners outside of the State of New Jersey and to levy a tax upon the transfer thereof beyond the jurisdiction of the State of New Jersey and in the City of New York and State of New York where the said property was located, and such statutes as thus applied and administered are repugnant to the Fourteenth Amendment of the United States Constitution, by depriving petitioners of their property without due process of law and by denying them the equal protection of the laws.

Wherefore, petitioners pray for the allowance of an appeal from the judgment and decision of the said Court of Errors and Appeals of the State of New Jersey to the Supreme Court of the United States, in order that the decision and judgment of the Court of Errors and Appeals of the State of New Jersey may be examined and reversed. Petitioners further pray that a citation be issued directed to the State Tax Commissioner of New Jersey, the appellee herein, and that a transcript of the record, proceedings and papers in the case, duly authenticated by the Clerk of the Court of Errors and Appeals of the State of New Jersey, be sent to the Supreme Court of the United States, as provided by law. The errors upon which the petitioners claim to be entitled to appeal are those above stated and more fully set forth in an assignment of errors filed herewith.

Jehiel G. Shipman, Claude A. Hope, Attorneys for and of Counsel with Petitioners-Appellants.

[fol. 153] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 17, 1942

Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, assign the following errors in the records and proceedings in this cause.

1. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the estate of George W. E. Atkins and levying the tax upon the appellants under Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937, 54:34-1, 54:34-12), whereby the State Tax Commissioner, in assessing and fixing the cash value of the property passing to George Chew [fol. 154] Atkins at the sum of $298,991.86, and in levying a tax on the transfer thereof in the sum of $9,899.59, included as a part of the property transferred to said George Chew Atkins and used as a basis of such tax one-half of the appraised value of a certain trust fund created by George W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York, and outside of the State of New Jersey, and the transfer thereof occurred outside of the State of New Jersey and beyond the jurisdiction of the said State. The said Court of Errors and Appeals erred in ruling that the said sections of the statutes of New Jersey, as construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not

deprive petitioners-appellants of their property without due process of law.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the Estate of George W. E. Atkins and levying the tax upon the appellants under Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937, 54:34-1, 54:34-12), whereby the State Tax Commissioner in assessing and fixing the cash value of the property passing to George Chew [fol. 155] Atkins at the sum of $298,991.86 and in levying a tax on the transfer thereof in the sum of $9,899.59, included as a part of the property transferred to said George Chew Atkins and used as a basis of such tax one-half of the appraised value of a certain trust fund created by George W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York, and outside of the State of New Jersey, and the transfer thereof occurred outside of the State of New Jersey, and beyond the jurisdiction of said State; and the said Court of Errors and Appeals erred in ruling that such sections of said statutes of New Jersey, as so construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deny the petitioners-appellants the equal protection of the laws.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the Estate of George W. E. Atkins and levying the tax upon the appellants under

Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937; 54:34-1, 54:34-12), whereby the State Tax Commissioner in assessing and fixing the cash value of the property passing to John Norton Atkins at the sum of $302,474.32 and in levying a tax on [fol. 156] the transfer thereof in the sum of $10,098.46, included as a part of the property transferred to said John Norton Atkins and used as a basis of such tax one-half of the appraised value of a certain trust fund created by George W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York and outside of the State of New Jersey, and beyond the jurisdiction of the said State; and the said Court of Errors and Appeals erred in ruling that the said sections of the statutes of New Jersey, as so construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deprive petitioners-appellants of their property without due process of law.

4. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, which said judgment affirmed the decree of the Prerogative Court of the State of New Jersey in sustaining the action of the State Tax Commissioner of the State of New Jersey in assessing and fixing the cash value of the Estate of George W. E. Atkins and levying the tax upon the appellants under Sections 1 and 18, Chapter 228, of the Laws of 1909, as respectively amended by Section 1 of Chapter 90 of the Laws of 1935 and Section 12 of Chapter 303 of the Laws of 1931 (Revised Statutes of New Jersey 1937, 54:34-1, 54:34-12), whereby the State Tax Commissioner in assessing and fixing the cash value of the property passing to John Norton Atkins at the sum of $302,474.32 and in levying a tax on the transfer thereof in the sum of $10,098.46, included as a part of the property transferred to said John Norton Atkins and [fol. 157] used as a basis of such tax one-half of the appraised value of a certain trust fund created by George

W. E. Atkins in the City of New York, State of New York, on the 16th day of May, 1929, under an agreement between said George W. E. Atkins and the Central Hanover Bank and Trust Company, a banking corporation of the State of New York, although the said trust fund had its situs in the State of New York, and outside of the State of New Jersey, and the transfer thereof occurred outside of the State of New Jersey and beyond the jurisdiction of said State; and the said Court of Errors and Appeals erred in ruling that the said sections of the said statutes of New Jersey, as so construed, applied and administered in holding said assessment and tax to be valid, were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deny the petitioners-appellants the equal protection of the laws.

Jehiel G. Shipman, Claude A. Hope, Attorneys for and of Counsel with Appellants

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[fol. 158] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—December 15, 1942

It appearing to the Court in the cause stated that the petitioners-appellants, Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins, and John Norton Atkins, as Executors under the last will and testament of George W. E. Atkins, deceased, and George Chew Atkins and John Norton Atkins, individually, have filed their petition for appeal to the Supreme Court of the United States, from the judgment of the Court of Errors and Appeals of New Jersey and have filed therewith their assignment of errors, and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question,

It is hereby Ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the judgment rendered in said cause by the Court of Errors and Appeals of New Jersey on the 18th day of September, 1942, and

that said petitioners-appellants give a bond with good and sufficient security in the sum of Two Hundred and Fifty [fol. 159] Dollars ($250) that they as appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good.

It is further Ordered that the Clerk of the Court of Errors and Appeals of the State of New Jersey prepare and certify a transcript of the record and proceedings and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

Dated: December 15th, 1942.

Owen J. Roberts, Associate Justice, Supreme Court of the United States.

Jehiel G. Shipman, Claude A. Hope, Counsel for Petitioners-Appellants.

[fol. 160] Citation in usual form omitted in printing.

[fols. 161-164] Cost Bond on Appeal for $250.00 approved and filed Dec. 19, 1942 omitted in printing.

[fol. 165] In the Court of Errors and Appeals

Central Hanover Bank and Trust Company, a banking corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors under the Last Will and Testament of George W. B. Atkins, Deceased, and George Chew Atkins and John Norton Atkins, individually, Appellants,

vs.

William D. Kelly, State Tax Commissioner (Successor to J. H. Thayer Martin), Appellee

Praecipe for Record—Filed December 17, 1942

The following are the portions of the record which are to be incorporated in the transcript to be made by the Clerk and filed with the Clerk of the United States Supreme Court:

1. The petition for appeal.
2. Assignment of Errors.
3. Order allowing appeal.

4. Citation and bond.

5. One copy of the printed state of the Case in the above entitled cases in the New Jersey Court of Errors and Appeals.

6. Statement of basis of jurisdiction under Rule 12.

7. Proof or acknowledgement of service upon the appellee of the citation and of copy of the petition, order allowing appeal, assignments of error and statement required by paragraph 1 of Rule 12, and a statement directing attention to paragraph 3 of Rule 12 and proof of service of these papers.

[fol. 166] 8. Per curiam opinion of the Court of Errors and Appeals and judgments entered thereon in the above cases.

9. Order of Substitution.

10. This praecipe and proof or acknowledgment of service of a copy thereof.

Jehiel G. Shipman, Claude A. Hope, Attorneys for and of Counsel with Appellants.

[fol. 167] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 168] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed January 29, 1943

To the Clerk of the Supreme Court of the United States:

Come now the appellants, pursuant to paragraph 9 of Rule 13 of the Revised Rules of this Court, and adopt their Assignment of Errors as their statement of points to be relied upon, and designate the following parts of the record as necessary for the consideration thereof, viz.:

1. The petition for appeal.
2. Assignment of Errors.
3. Order allowing appeal.
4. Citation.
5. Praecipe for transcript of record.

6. Printed State of Case in the New Jersey Court of Errors and Appeals, with the exception of pages 42-82 inclusive.

7. Opinion of the Court of Errors and Appeals.

8. Judgment of the Court of Errors and Appeals.

9. This statement of points and designation as to printing.

Dated, January 27th, 1943.

Robert McC. Marsh, Jehiel G. Shipman, Claude A. Hope, Counsel for Appellants.

[fol. 169] Supreme Court of the United States, October Term, 1942

No. 659

Order Noting Probable Jurisdiction—February 15, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 15, 1943.

Endorsed on Cover: File No. 47,160. New Jersey, Court of Errors and Appeals, Term No. 659. Central Hanover Bank and Trust Company, a Banking Corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors, etc., et al., Appellants vs. William D. Kelly, State Tax Commissioner of New Jersey. Filed January 18, 1943. Term No. 659, O. T. 1942.